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* Together with Zerbst v. Smith; Collins; No. 783-789
Owens; Peel; Jones; Stone; & Sullivan

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Part

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

vs.

SHERMAN KIDWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No.

FRED G. ZERBST, WARD-
EN, UNITED STATES
PENITENTIARY, ATLANTA,
GEORGIA, RESPOND-
ENT,

Appellant,

versus

SHERMAN KIDWELL, PE-
TITIONER,

Appellee.

NO. 1192

HABEAS CORPUS

Appeal from the District Court of the United States
For the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,

United States Attorney, Atlanta, Ga.,

HARVEY. H. TYSINGER, ESQ.,

Assistant United States Attorney, Atlanta, Ga.,

H. T. NICHOLS, ESQ.,

Assistant United States Attorney, Atlanta, Ga.,

Attorneys for Appellant,

PAUL CRUTCHFIELD, ESQ., 305 Volunteer
Bldg., Atlanta, Ga.,

CLINT W. HAGER, ESQ., 621 Atlanta Nat'l Bank
Bldg., Atlanta, Ga.

Attorneys for Appellee.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF GEORGIA, ATLANTA DIVISION

SHERMAN KIDWELL, PE-
TITIONER,

v.

FRED G. ZERBST, WARD-
EN, U. S. PENITENTIARY,
ATLANTA, GEORGIA, RE-
SPONDENT.

No. 1192

HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

Now comes Sherman Kidwell, and respectfully shows to this Honorable Court that he is a citizen of the United States and is now unlawfully held and restrained of his liberty by Fred G. Zerbst, Warden of the United States Penitentiary in Atlanta, Georgia, within the jurisdiction of this Honorable Court.

1

That your petitioner pleaded guilty in the District Court of the United States for the Eastern District of Kentucky at Frankfort, Kentucky, to having violated Secs. 12 and 39, Title 27, U. S. C. A., of unlawfully manufacturing and possessing property designed for manufacturing intoxicating liquors, and the Court, on September 27, 1932, thereupon passed upon your petitioner the following sentence:

"It is adjudged by the Court that the defendant be confined in a United States Penitentiary, or

1.

Prison Camp, for the term of two years from this 27th day of September, A. D., 1932, and the Marshal is directed to deliver said defendant to the warden of said Penitentiary or Prison Camp, so that sentence may be executed according to law."

That your petitioner entered upon and commenced to serve said sentence on or about September 27, 1932, and served continuously on said sentence until on or about August 27, 1933, when he was granted a parole.

That your petitioner served continuously on said parole until June 29, 1935, when he was returned to a United States Penitentiary or Prison Camp, and has been continuously serving and confined in said penitentiary or prison camp since that date, and, counting the time served in a penitentiary or prison camp from on or about September 27, 1932, to the date his parole was granted, and the time served on parole, and the time served in a United States Penitentiary or Prison Camp since June 29, 1935, he has more than fully and completely served and performed the maximum and maximum remainder of his sentence as originally imposed.

Certified copies of the original judgment, sentence and final mittimus are hereto attached, marked exhibit "A", and made a part of this petition.

2.

That your petitioner was indicted by a United States Grand Jury duly impaneled and sworn within the Eastern District of Kentucky on or about May 17, 1934, and was charged with unlawfully, wilfully and feloniously

2.

possessing a quantity of distilled spirits, to-wit, 25 gallons, more or less, of whiskey, in violation of Title 2, Sec. 201, U. S. C.

That your petitioner having pleaded guilty to said indictment on June 18, 1935, in the United States District Court for the Eastern District of Kentucky, then sitting at Lexington, Kentucky, the Court thereupon passed upon your petitioner, on June 29, 1935, the following sentence:

“Order Entered June 29, 1935,

This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) years at Hard Labor, and they are now committed.”

That your petitioner entered upon and commenced to serve said sentence on June 29, 1935, and has continuously served said sentence from that date, and has, counting the deductions from said sentence for good conduct to which petitioner is entitled by law, and also industrial good time or allowances, served said sentence in full it having been fully performed on or about January 16, 1937.

Certified copies of the original indictment, order plea of guilty, and order of sentence and commitment

are attached hereto, marked "Exhibit B", and made a part of this petition.

3.

Petitioner, from the best of his knowledge, information and belief, shows that his incarceration in the United States Penitentiary at Atlanta, Georgia, and the restraint of your petitioners liberties by the respondent herein, the Warden of said Penitentiary, is being done under the color of authority of commitments under either one of the above named sentences, and that such restraint and incarceration is illegal for that said sentences have been fully served and performed as required by law.

WHEREFORE, your petitioner prays that he be released from unlawful custody and that this Honorable Court issue its writ of habeas corpus directing the respondent herein to produce the body of your petitioner before this Honorable Court at a time and place to be specified therein, and that said respondent be required to show cause, if any he has, why your petitioner should not be released.

PAUL CRUTCHFIELD,
Attorney for Petitioner.

GEORGIA,)
FULTON COUNTY:)

Personally appeared before me, the undersigned attesting officer, Sherman Kidwell, who, after being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein contained are true, except

4.

as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the redress sought therein.

SHERMAN KIDWELL, *Petitioner.*

Georgia, Fulton County.

Sworn to and subscribed before me
this 23rd day of March, 1937

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

EXHIBIT "B"—INDICTMENT

United States District Court

EASTERN DISTRICT OF KENTUCKY

June Term, 1935 - held at Lexington

The Grand Jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths do find and present:

That, heretofore, to wit: on and about the 17th day of May, 1934, before the finding of this indictment, in said Eastern District of Kentucky, and within the jurisdiction of this court, one Otha L. Lawson, Sherman Kidwell, Roy C. Norvell and Vannie Kelley late of said

Eastern District of Kentucky, unlawfully, wilfully and feloniously did possess a quantity of distilled spirits, to wit, 25 gallons more or less, of whiskey, without the immediate container thereof having affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Liquor Taxing Act,
Title II, Sec. 201.

MAC SWINFORD,
United States Attorney

Filed in open Court this 11
day of June, A. D. 1935.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF KENTUCKY.
LEXINGTON.

UNITED STATES

vs.

5824

Sherman Kidwell
Roy C. Norvell

PLEA

Order entered June 18, 1935

The U. S. Attorney being present, defendants appear, are arraigned and enter pleas of guilty to the in-

dictment herein, and are committed to the custody of the Marshal to await the further order of the Court.

H. CHURCH FORD, *Judge*.

United States

vs. *

5824

Otha L. Lawson
Sherman Kidwell

JUDGMENT

Order entered June 29, 1935

This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) Years at Hard Labor, and they are now committed.

H. CHURCH FORD, *Judge*.

COMMITMENT

DISTRICT COURT OF THE UNITED STATES

Eastern District of Kentucky

**THE PRESIDENT OF THE UNITED
STATES OF AMERICA**

**To the Marshal of the United States for the Eastern
District of Ky.**

GREETING:

WHEREAS, at the June term of said Court, 1935, held at Lexington, Kentucky, in the said district to-wit, on June 29, 1935 Sherman Kidwell was sentenced by said Court, upon a plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in an institution of the Reformatory type, preferably the ————— for and during the term or period of Two (2) years at hard labor beginning June 29, 1935 and to pay a fine to the United States in the sum of \$. and costs \$. and to stand committed until such fine and costs shall be paid, or until he shall otherwise be discharged by due course of law, for having Transported untaxpaid liquor, etc., in violation of Title 2, Sec. 201, U. S. C.

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take the body of the said Sherman Kidwell and commit the same pursuant to the above sentence.

WITNESS, the Honorable H. Church Ford, Judge of the District Court of the United States for the

Eastern District of Kentucky, this 29 day of June
A. D. 1935.

S. W. STACEY, *Clerk*

By SPENCER L. FINNELL
Deputy Clerk

(SEAL)

RETURN

I have executed the within writ in the manner following, to-wit: On June 29, 1935, I delivered said Sherman Kidwell to the Jailor of the Fayette Co. Lexington, Ky., temporarily pending transfer to the institution designated for the service of sentence, and on July 12, 1935, I delivered said Sherman Kidwell to the Supt. of U. S. Industrial Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

J. M. MOORE
United States Marshal, E. D. K.

By NEAL GUILFOILE, *Deputy*

Filed July 29, 1935.

S. W. Stacey, *Clerk U. S.*
District Court.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
EASTERN DISTRICT OF KENTUCKY)

I, A. B. ROUSE, Clerk of the United States District Court in and for the EASTERN District of KENTUCKY, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, order plea of guilty, and order of sentence and Commitment in case of U. S. vs. Sherman Kidwell, No. 5824-Lexington docket now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto
subscribed my name and affixed the seal of the
aforesaid Court at Lexington this 3 day of March,
A. D. 1937.

(SEAL)

A. B. ROUSE
Clerk.

By FLORENCE DUNHAM *Deputy Clerk.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

United States, *Plaintiff*

vs. No. 5590

Sherman Kidwell, *Defendant.*

JUDGMENT AND SENTENCE

ENTERED BY JUDGE A. M. J. COCHRAN,

SEPTEMBER 27th, 1932.

It is adjudged by the Court that the defendant be confined in a U. S. Penitentiary, or Prison Camp, for the term of two years from this 27th day of Sept., A. D., 1932, and the Marshal is directed to deliver said defendant to the Warden of said Penitentiary or Prison Camp, so that sentence may be executed according to law.

PENITENTIARY MITTIMUS

ISSUED SEPTEMBER 27th, A. D., 1932.

DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF KENTUCKY

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To the Marshal of the Eastern District of Kentucky and to the Warden of the U. S. Penitentiary, in the City of Atlanta in the State of Georgia or of prison camp, GREETING:

WE COMMAND YOU, the Marshal to take the body of Sherman Kidwell and deliver him to the Warden of the said Penitentiary, and you the Warden of the said Penitentiary, are commanded to receive into your Penitentiary the body of him, the said Sher-

man Kidwell and him there safely keep for the full term of two years from this 27 day of Sept., A. D., 1932; at 10 o'clock A. M., and until he shall satisfy the United States in the sum of — — — — dollars, fine, also the sum of — — — — dollars, which to us in our said Court was adjudged for our costs in that behalf expended; the said Sherman Kidwell having plead guilty in our District Court of the United States, for the Eastern District of Kentucky, at Frankfort, of having Viol. Secs. 12 and 39 Title 27 U. S. C. A. unlawfully manufacturing and possessing property designed for manufacturing intoxicating liquors.

NOTE: Sentence to be served in penitentiary or prison camp and sentenced by said Court to said term of imprisonment and to pay said fine and costs, as appears to us of record; and how you shall have executed this writ make known to the Judges of our said Court, at the Federal Court Hall, in the City of Frankfort, on the first Monday in Nov. next, and have then and there this writ.

Witness, The Honorable A. M. J. Cochran, Judge of the District Court of the United States, at the City of Frankfort, this 27 day of Sept., A. D., 1932, and of our Independence the 157 year.

(SEAL) S. W. STACEY, *Clerk.*

By LILLIAN M. WIARD, *Deputy Clerk.*

MARSHAL'S RETURN

Received Pen Mittimus at Lexington, Ky. on Oct. 1, 1932, and executed same on Oct. 5, 1932, by delivering the body of the within named Sherman Kidwell to Federal Reformatory Camp Petersburg, Va. together with copy of the within.

J. H. HAMMONS, *U. S. Marshal,*
By FLINT DAVIS, *Deputy.*

Mittimus Returned & Filed
October 21, 1932

S. W. STACEY, *Clerk,*

By LILLIAN M. WIARD, *Deputy Clerk.*

CLERK'S CERTIFICATE

EASTERN DISTRICT OF KENTUCKY)
THE UNITED STATES OF AMERICA) ss:

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original.

Judgment and Sentence and Final Mittimus in case of U. S. vs. Sherman Kidwell, No. 5590 now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the

aforesaid Court at Frankfort this 16th day of
March, A. D. 1937.

(SEAL)

A. B. ROUSE
Clerk

By SARA M. CADEN
Deputy Clerk.

ORDER GRANTING WRIT

Read and considered. Let the writ issue as prayed,
returnable before me at Atlanta, Georgia, at 10:00
o'clock a. m. on the 27th day of March, 1937.

This the 26th day of March, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
March 26th, 1937.

J. D. STEWARD, *Clerk,*

By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED).

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to said writ, produces the body of the petitioner at the time and place directed therein and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a

commitment issued by the District Court of the United States for the Eastern District of Kentucky, a copy of which is hereto attached and made a part of this response. Also attached hereto and made a part of this response is copy of petitioner's conduct record sheet on file in the Atlanta Penitentiary.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
*Assistant United States Attorney,
Attorney for Respondent.*

NOTE: Mittimus omitted, same appears as exhibit to petition.

Filed March 27th, 1937

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA.

CONDUCT RECORD

Record of Sherman Kidwell Color White No. 46682
Crime Violation Internal Revenue Law (Trans. Liq.)
Sentence 2 years Fine \$None Cost None Not Com-
mitted Received Aug. 23, 1935 Where convicted E.
Ky-Lexington. Sentenced June 29-1935 Occupation
Laborer- Age 24 Sentence commences June 29-1935

Ex. good time 14 Full term expires June 28-1937- Good time allowance 144 days. Short term expires Jan 21, 1937- Residence, Lexington, Ky. Eligible for parole Feb. 28-1936- Action of Parole Board March 27, 1936- "DENIED" By Trans. from U. S. I. R. Chillicothe, Ohio WANTED (a) to be held at Exp. of Sent. as Reg. No. 46682, as a Parole Violator from Fed. Ref. Camp, Petersburg Va. as Reg No. 1699-Lee; to be listed for hearing on Parole revocation at next meeting following expiration date of instant sentence. 1-21-37- Extra good time 14 Days 9-27-32-Sent. to 2 Years. 10-5-32-Recd at FRC. Petersburg, Va. 8-27-33 Paroled from there. 6-18-34-Declared Parole Violator as No. 1699-Lee, has 395 Days to serve if parole revoked. 6-29-35- Sent. to 2 Years. 8-23-35 received at U. S. P. Atlanta, Ga. as No. 46682. 1-21-37-sentence expired as No. 46682, 1-22-37, in custody to serve remainder of first sentence.

(TITLE OMITTED).

AMENDMENT TO ANSWER

Now comes the respondent in the above entitled proceeding, and with leave of the Court, amends his response heretofore filed, and says to the Court, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner.

The first sentence was rendered by the U. S. District Court for the Eastern District of Kentucky on Sept. 27, 1932, and ordered imprisonment for a term of two years. On August 27, 1933 petitioner was released on parole. On August 23, 1935, petitioner was returned to the institution with a new sentence imposed by the same court, and directing incarceration for two years. On January 29, 1936, the predecessor of your respondent received a letter dated January 25, 1936, signed by Ray L. Huff, Parole Executive, enclosing a parole warrant for petitioner for violation of the parole granted under his first sentence. Said letter further directs that the said warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioners case.

On January 21, 1937, the second sentence of two years expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 395 days if his parole be revoked.

Respondent does not, of course, maintain that there are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copy of the letter above referred

to. The other material documents are attached as exhibits to the original response.

Wherefore, having fully answered, respondent prays the judgment of the court,

Respectfully submitted,

LAWRENCE S. CAMP,

United States Attorney,

HARVEY H. TYSINGER,

Assistant U. S. Attorney,

H. T. NICHOLS,

Assistant U. S. Attorney,

Counsel for Respondent.

ORDER ALLOWING AMENDMENT

The foregoing amendment to response is hereby allowed, subject to objection.

This 24th day of April, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

**PETITIONER'S EXHIBIT NO. 1—LETTER,
RAY L. HUFF, JANUARY 25, 1936**

**SANFORD BATES
DIRECTOR**

**DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON**

January 25, 1936

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

Attention: Parole Officer.

In re: Sherman Kidwell,

Reg. No. 46682-A ZW

Dear Sir:

Enclosed herewith is parole violator warrant in duplicate and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Kidwell into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after Kidwell is in custody on the warrant.

When you have executed the warrant return it to this office stating specifically that you are holding

Kidwell as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF
Parole Executive.

Filed April 24th, 1937.

(TITLE OMITTED).

OPINION AND ORDER SUSTAINING WRIT

Petitioner was sentenced on September 27th, 1932, in the United States District Court for the Eastern District of Kentucky, to serve a term of two years in a penitentiary or prison camp for violation of the National Prohibition Act.

He was released on parole on August 27th, 1933, and was declared to be a parole violator on June 18th, 1934. On the latter date, June 18th, 1934, a warrant was issued by the Chairman of the United States Board of Parole, which stated:

“And whereas, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, the same is hereby revoked and the said paroled prisoner is declared to be a fugitive from justice.

“Now, therefore, this is to command you to execute this warrant by taking the said Sherman

Kidwell, wherever he is found in the United States, and him safely return to the institution hereinafter designated."

No institution was designated in the warrant, but there were added thereto the words: "When apprehended communicate with Director, Bureau of Prisons for instructions." On June 11th, 1935, petitioner was indicted, with others, in the same court for violating the Liquor Tax Act, and was sentenced by said Court on June 29th, 1935, the sentence being in the following language:

"This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) Years at Hard Labor, and they are now committed."

Petitioner was committed on the same day to jail pending transfer to the United States Industrial Reformatory at Chillicothe, where he was received on July 12th, 1935. He was subsequently transferred to the Atlanta Penitentiary, where he was received on August 23rd, 1935.

On January 25th, 1936, the Parole Executive wrote the Warden of the Penitentiary at Atlanta the following letter:

"Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

Attention: Parole Officer.

In re: Sherman Kidwell,

Reg. No. 46682-A. ZW

"Dear Sir:

"Enclosed herewith is parole violator warrant in duplicate and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

"Please place the warrant as a detainer and take Kidwell into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after Kidwell is in custody on the warrant.

"When you have executed the warrant return it to this office stating specifically that you are holding Kidwell as a violator and on the original commitment."

The record shows, therefore, that petitioner has been held under two sentences of the same court, in the same penitentiaries (at Chillicothe and Atlanta) from July 12th, 1935, until January 21st, 1937, when his second sentence expired, and from January 21st, 1937 until

the present time solely under the parole warrant and the letter of the Parole Executive.

When petitioner was declared to be a parole violator he had 395 days to serve on the first sentence. If, therefore, the first sentence began to run again when he was returned to the penitentiary and ran concurrently with the second sentence, then petitioner has completed the service of both sentences and is now being illegally held and should be discharged.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Aderhold v. McCarthy*, 65 F(92d) 452, said, in commenting upon sentences without any provision for one sentence to follow the other, even where the sentences were imposed by different courts, that "Each was imposed by authority of the United States, and was to be executed in the Atlanta penitentiary. There being nothing to prevent, each would begin to run on his arrival there, and he would be entitled to discharge at the expiration of the longest term.

This seems to be the settled law (*Zerbst v. Lyman*, (CCA 5th) 255 Fed. 609; *White v. Kwaitkowski*, (CCA 10th) 60 F(2d) 264; *Arnold v. McCarthy*, (CCA 5th) 65 F(2d) 452.)

The fact that the first sentence was, at the time of parole, being served in a different institution, is, as held by the Circuit Court of Appeals for the Tenth Circuit, in *White v. Kwaitkowski*, 60 F(2d) 264, wholly immaterial for, as the Court said: "To hold otherwise is to hold that the Attorney General may by transfer to the reformatory change concurrent to con-

secutive sentences; but he had no such judicial power." The Court further said in this case, "The new Board (Parole Board) had no power to return the appellee to Chillicothe, and did not attempt to do so. The remainder of the first sentence was served at Leavenworth, and it was satisfied."

In the McCarthy case the Circuit Court of Appeals for the Fifth Circuit held that the two sentences ran concurrently, although, as shown by the record, it was strongly contended that they should not because the sentences were imposed in different courts and in different states and because petitioner was never actually confined in a penitentiary under the commitment issued on one case, until after he had served his sentence in the other.

The case at bar presents even stronger grounds for the release of the prisoner than the McCarthy case, since here the sentences were imposed by the same court without providing that the cases should run consecutively, with full information of the previous sentence, either actual or readily obtainable from the United States Attorney under the present practice in United States courts.

Since the trial court did not make the sentences run consecutively, they must be held to run concurrently.

For stronger reasons, sentences could not be made to run consecutively by the mere act of the Parole Board.

The respondent contends that the parole has never been revoked. There was no evidence in this case to this effect, other than the above quoted letter of the Pa-

role Executive, and the warrant itself recites that the parole was revoked. However I do not think this material since petitioner's first sentence began to run again the moment he was received at the penitentiary and the failure of the Parole Board to comply with the law requiring it, "at the next meeting of the Board of Parole held at said prison after the issuing of the warrant for the retaking of any paroled prisoner" to grant a hearing and "then or any time in its discretion make an order to terminate said parole," would not operate to exclude from the computation of the sentence the time the prisoner was actually in the institution after his arrest and return to the custody of the United States, whether the parole was revoked or not. The fact he was also held under a commitment upon a concurrent sentence would make no difference. The law plainly contemplates that "only the time the prisoner was on parole" and not held under a sentence, that must be served in a different institution, should be excluded from the computation of the sentence. (18 USCA Par. 719.) Otherwise the Parole Board, by either intentional or negligent omission to exercise its discretion to terminate the parole, which discretion must be a reasonable one, might indefinitely increase the sentence imposed. In this case the increase would be more than a year. Not even a court has the power to increase a sentence after it is once imposed, so certainly the Parole Board, which has no power to impose sentences, could not do so.

The illegality of the action of the Parole Board would be strikingly illustrated if, in the present instance, there had been no second sentence and petitioner had been returned to the penitentiary and left there

for two years before the revocation of his parole was considered, and then compelled, thereafter, upon a formal revocation of the parole, to serve the 395 days claimed to be left of his first sentence.

The second sentence, being under the law concurrent, did not affect the running of the first sentence, and the result, so far as the first sentence is concerned, would be the same as if there had been no second sentence.

I am of opinion, therefore, that petitioner's first sentence began to run again when he was received at the United States Reformatory at Chillicothe, Ohio, on July 12th, 1935, as shown by the Marshal's return on the commitment issued upon the second sentence.

Whereupon it is considered, ordered and adjudged that the writ of habeas corpus be and is hereby sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 13th day of May, 1937.

E. MARVIN UNDERWOOD,

United States District Judge.

Filed May 13th, 1937.

(TITLE OMITTED).

PETITION FOR APPEAL

**TO THE HONORABLE E. MARVIN UNDER-
WOOD, JUDGE OF SAID COURT:**

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States; it is ordered that the same be allowed without bond being given by appellant.

It is further ordered that pending the determination of this appeal appellee shall be released on bail in the sum of \$100.00 without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed May 14, 1937.

(TITLE OMITTED).

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding the case was, tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits attached and the response and amendment to response with exhibits annexed, together with the testimony of Ben F. Bates, who testified that he is Record Clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's several sentences substantially as they are set out in the amendment to response, and

further that the writ of habeas corpus is not premature, but that, if the terms be computed as running concurrently, or, as petitioner alleges in his petition they should be, then petitioner would have been eligible for release from custody on Jan. 21, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the case.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

Filed May 18, 1937.

(TITLE OMITTED).

ASSIGNMENTS OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the Court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of the respondent and the amendment to the answer,

the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the Respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of Respondent.

LAWRENCE S. CAMP,

United States Attorney

HARVEY H. TYSINGER,

Assistant U. S. Attorney

H. T. NICHOLS,

Assistant U. S. Attorney.

Filed May 14, 1937.

(TITLE OMITTED).

PRAECIPE

**TO THE CLERK OF THE ABOVE-ENTITLED
COURT:**

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said

Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.
2. The response of the respondent and amendment thereto with exhibits attached.
3. The judgment and order of court of May 13th, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as prescribed by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent.

Filed May 14, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant*.

versus

SHERMAN KIDWELL, PETITIONER, *Appellee.*

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 21st day of May, A. D. 1937.

(SEAL) J. D. STEWARD,
Clerk United States District Court, Northern
District of Georgia,

By

C. A. MCGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

SHERMAN KIDWELL

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the
Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. —The material facts common to all the cases are these: Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for

good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18

U. S. C. A. 716b) prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary, where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely

irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mitimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escove vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was necessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, Dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the

prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No: 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

SHERMAN KIDWELL

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 34 to 46 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8468, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Sherman Kidwell is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 33 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

DEWEY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8476

FRED G. ZERBST,
WARDEN, UNITED STATES PENI-
TENTIARY, AT-
LANTA, GEORGIA,
RESPONDENT,

Appellant,

versus

DEWEY SMITH,
PETITIONER,

Appellee.

NO. 1193
HABEAS CORPUS

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta Ga.,

H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,
Attorneys for Appellant

CLINT W. HAGER, ESQ.,
621 Atlanta National Bank Bldg., Atlanta, Ga.,
Attorney for Appellee

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THE UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Dewey Smith,
Petitioner,

vs.

Fred G. Zerbst, War-
den, United States
Penitentiary, Atlan-
ta, Georgia,

Respondent.

No. 1193

HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your petitioner and presents this, his petition for writ of habeas corpus, and shows to the Honorable Court the following facts:

That your petitioner is actually imprisoned and restrained of his liberty and detained in the United State Penitentiary, which is located within the jurisdiction of the United States District Court for the Northern District of Georgia, Atlanta Division.

Your petitioner was originally tried and sentenced to the United States Penitentiary on the 10th day of July, 1934, under sentence of two years and pay a fine of \$500.00 imposed by the United States District Court at Charleston, W. Va. Subsequently, a detainer was placed for the custody of your petitioner

upon his release at the expiration of his two years sentence by the Federal Authorities at Catlettsburg, Kentucky.

On February 14, 1936, your petitioner was discharged conditionally in custody of the Federal Authorities and returned to Catlettsburg, Kentucky. Thereafter, your petitioner applied for and was released on bond for his appearance in the United States District Court.

On May 26, 1936, your petitioner was sentenced to serve one year and one day on the instant case by the United States District Court at Catlettsburg, and on May 29, 1936, was committed to the United States Penitentiary at Atlanta, Ga.

During the interim between February 14, 1936, and May 26, 1936, your petitioner is purported to have been arrested on a charge of drunkenness and thereby violated his conditional release. The authorities failed to return your petitioner immediately to complete his first sentence as a conditional release violator, but informed him that the "good time" which was revoked would have to be served after the expiration of the latter sentence.

Your petitioner, in the foregoing petition for a writ of habeas corpus, respectfully shows that the revocation of his conditional release on his first sentence should have taken effect prior to trying your petitioner on the latter case, and the fact that the court imposed a sentence on a different case, your petitioner believes that the 144 days good time re-

voked from the first sentence should have been served concurrently with the latter sentence, which expired on March 16, 1937.

Therefore, your petitioner being unable to submit a brief of laws governing such cases, beg this Honorable Court to take cognizance of and protect such rights as he may justly be entitled.

WHEREFORE: Your petitioner prays that a writ of habeas corpus issue directed to the Warden of the United States Penitentiary at Atlanta, Georgia, to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises and that this court may proceed in a summary way to determine the facts in this regard and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as the law and justice may require.

DEWEY SMITH, No. 48628-A,
Petitioner.

COUNTY OF FULTON)
STATE OF GEORGIA) ss:

AFFIDAVIT

Personally appeared before me, Dewey Smith, who being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein con-

tained are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the redress sought therein.

DEWEY SMITH,
Petitioner.

Sworn to and subscribed before me this 16th day of March, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

DEWEY SMITH,
Affiant.

Sworn to and subscribed before me this 16th day of March, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

**ORDER GRANTING WRIT IN
FORMA PAUPERIS**

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 3rd day of April, 1937.

This the 1st day of April, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
U. S. District Court,
Northern District of
Georgia, April 1st, 1937,

J. D. STEWARD, *Clerk,*
By C. B. MEADOWS, *Deputy Clerk.*

(TITLE OMITTED.)

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the

Southern District of West Virginia. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner. The first sentence was rendered by the U. S. District Court for the Southern District of West Virginia, and commands imprisonment for the term of two years. This sentence with allowance for good conduct expired on February 14, 1936, and petitioner was conditionally released from the institution. He was returned to the institution on May 29, 1936, under a warrant of commitment issued by the U. S. District Court for the Eastern District of Kentucky, directing imprisonment for one year and one day. It appears that on March 26, 1936, a parole warrant was issued for the retaking of petitioner as a conditional release violator under the first sentence of two years. This warrant was transmitted to the predecessor in letter dated June 29, 1936, directing that warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioner's case.

On March 17, 1937, the second sentence of one year and one day expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 117 days if his conditional release be revoked.

Respondent does not, of course, maintain that there

are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copies of mittimus of U. S. District Court for Eastern District of Kentucky, of parole warrant signed by Charles Whelan, Member of the U. S Board of Parole, of the return thereof. and of letter dated June 29 1936, signed by Ray L. Huff, Parole Executive, addressed to Mr. A. C. Aderhold, Warden, U. S. Penitentiary, Atlanta, Ga., said exhibits being marked "A", "B", "C", and "D" respectively. Respondent also attaches hereto and makes a part of this response copy of conduct record sheet for the convenience of the court, which tabulates the computation of petitioner's terms of imprisonment, same being marked "D".

Wherefore, having fully answered, respondent prays the judgment of the court.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
*Assistant U. S. Attorney
Counsel for Respondent.*

EXHIBIT "A"—COMMITMENT
IN THE DISTRICT COURT OF THE
UNITED STATES OF AMERICA
FOR THE
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG DIVISION

The President of the United States of America—

To the Marshal of the United States for the Eastern District of Kentucky and to the Warden of the U. S. Penitentiary at Atlanta, Ga., GREETING:

Whereas, at the May term of said Court, 1936, held at Catlettsburg, Ky. in said district and division, to wit, on May 27th, 1936, Dewey Smith was sentenced by said Court, upon his conviction to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for and during the term and period of ONE YEAR AND ONE DAY—Hard Labor beginning on the date on which he is received at the Boyd Co. Jail for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentenced is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; for violation of T. 2 Sec. 201 L. T. A.—(Transport untaxed liquor)

And Whereas, the Attorney General of the United States has designated the U. S. Penitentiary at At-

lanta, Ga., as the place of confinement where the sentence of said Dewey Smith shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Dewey Smith and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said U. S. Penitentiary with a copy of this writ; and you, the said Warden, to receive said Dewey Smith and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable H. Church Ford, Judge of said Court, and the seal thereof, affixed at Catlettsburg, in said district, this 27th day of May, 1936.

A. B. ROUSE,
Clerk.

(L. S.)

AUGUSTA Z. ROGERS,
Deputy Clerk.

RETURN

I have executed the within writ in the manner following, to wit: On May 27, 1936, I delivered said Dewey Smith to the Jailer of the Boyd Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on May 29, 1936, I delivered said Dewey Smith to the Warden of

U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

J. M. MOORE,
United States Marshal,

By W. F. NEALE,
Deputy.

EXHIBIT "B"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

For Retaking Prisoners Released under Authority
Pub. 210, 72d Congress

THE UNITED STATES BOARD OF PAROLE
To any Federal Officer Authorized to Serve Criminal
Process Within the United States:

WHEREAS, Dewey Smith, No. 44678-A was sentenced by the United States District Court for the Southern District of West Virginia to serve a sentence of two years — — — months, and — — — days for the crime of violating the Internal Revenue Act and was on the 14th day of February, 1936, released conditionally from the U. S. Penitentiary, Atlanta, Georgia.

. AND, WHEREAS, satisfactory evidence has been presented to the undersigned Member of this Board

that said prisoner named in this warrant has violated the condition of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Dewey Smith, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 26th day of March, 1936.

CHARLES WHELAN,
Member U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

EXHIBIT "C"

U. S. Penitentiary,
Atlanta, Ga.
March 17, 1937.

The within named, Dewey Smith, as Register No. 44678-A, was released on conditional release from this institution on February 14, 1936, until the expiration of his maximum term July 5, 1936. He was again committed to this institution on May 29, 1936, under sentence of 1 year and 1 day imposed May 27, 1936, which expired March 16, 1937, and he was retained in custody as a conditional release violator, to serve the

remainder of the first sentence, amounting to 177 days.

FRED G. ZERBST, *Warden,*

By:

Record Clerk.

**EXHIBIT "D"—LETTER, HUFF, PAROLE
EXECUTIVE, JUNE 29, 1936.**

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON

June 29, 1936.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Ga.

In re: Dewey Smith, old No. 44678-A.
new No. 48628-A. ZW

Dear Sir:

Enclosed herewith is copy of referral for consideration of alleged violation and violator warrant in duplicate for the above-named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Smith into custody on the warrant at the expiration of his present sentence. The case should be listed for

a hearing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office, stating specifically that you are holding the prisoner as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF
Parole Executive.

EXHIBIT "E"—CONDUCT RECORD

**UNITED STATES PENITENTIARY
ATLANTA, GEORGIA.**

Record of DEWEY SMITH Color White No. 48628 Alias *Dewey Robert Smith* Crime Vio. Int. Rev. Laws. (P&T Liq.) Sentence 1 year 1 day. Fine \$None Not Committed Received May 29, 1936 Where convicted E-Ky-Catlettsburg Sentenced May 27, 1936 Occupation Laborer Age 32 Sentence commences May 27, 1936 Full term expires May 27, 1937 Good time allowance 72 days. Short term expires Mar. 16, 1937 Residence Charleston, W. Va. Action of Parole Board: Sept. 14, 1936 "DID NOT FILE". Eligible for parole Sep. 27, 1936. WANTED: The Par. Board instructed on 6-29-36, that, after exp. inst. sent. subject as cond. rel. Vio. as No. 44678, is to be held in custody under warrant issued 3-26-36; return to be on warrant & same forwarded to

Board; revocation to be had at meeting of Board after exp. of inst. sentence.

ADMITS: 7-21-34, USP. Atlanta, Ga. same name No. 44678, Consp. (Liq. Laws) 2 Years. Disch. 2-16-36. Cond. Release. 3-16-37: Sentence expired as No. 48628. 3-17-37: In custody to serve remainder of 1st sentence as Reg. No. 44678, has 177 days to serve if CR. Revoked, Exp. 9-9-37.

Filed April 24th, 1937.

(TITLE OMITTED.)

**ORDER SUSTAINING WRIT AND
DISCHARGING PETITIONER**

The above case came on for hearing and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192, Habeas Corpus, this day decided, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst*, and upon authority of same:

It is considered, ordered and adjudged that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody at the

expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 13th day of Nov. 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed May 13th, 1937.

(TITLE OMITTED.)

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, F. G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the

Attorney General of the United States of America,
and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 14, 1937.

(TITLE OMITTED.)

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Parole Board's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense, afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the return of the respondent, the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney.
H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed May 14, 1937.

(TITLE OMITTED.)

**JUDGE'S CERTIFICATE AS TO THE
EVIDENCE**

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the case was tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits attached and the return of the respondent with exhibits annexed, together with the testimony of Ben F. Bates, who testified that he is record clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's several sentences substantially as they are set out in the return, and further that the writ of habeas corpus is not premature, but that, if the terms be computed as running concurrently, or as petitioner alleges in his petition they should be, then petitioner would have been eligible for release from custody on March 17, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the cause.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED.)

PRAECIPE

**TO THE CLERK OF THE ABOVE-ENTITLED
COURT:**

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.
2. The return of the respondent with exhibits attached thereto.
3. The judgment and order of court of May 13, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the

Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed May 14, 1937.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 17 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant*,

versus

DEWEY SMITH, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's

office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 26th day of May, A. D. 1937.

(SEAL)

J. D. S T E W A R D,
*Clerk, United States District Court,
Northern District of Georgia,*

By

C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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PAGE

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

DEWEY SMITH

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, and Clint W. Hager, Esq., for appellee, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same question for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had

expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence..

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for

good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General, and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A., § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. *Escoe vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, Dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole

statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A., § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

DEWEY SMITH

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof. It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 24 to 36 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8476, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Dewey Smith is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 23 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 784

**FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER**

VS.

ALLEN COLLINS

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938**

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 8477

FRED G. ZERBST,
WARDEN, UNITED
STATES PENITEN-
TIARY, ATLANTA,
GEORGIA RE-
SPONDENT,

Appellant.

versus

ALLEN COLLINS,
PETITIONER,

Appellee.

NO. 1200

HABEAS CORPUS.

Appeal from the District Court of the United
States for the Northern District of Georgia, Atlanta
Division.

LAWRENCE S. CAMP, ESQ.,

United States Attorney, Atlanta, Ga.,

HARVEY H. TYSINGER, ESQ.,

Asst. United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,

Asst. United States Attorney, Atlanta, Ga.

Attorneys for Appellant,

CLINT W. HAGER, ESQ.,

621 Atlanta Nat'l Bank Bldg., Atlanta, Ga.,

Attorney for Appellee.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF GEORGIA, ATLANTA DIVISION

Allen Collins, Petitioner,

vs.

Fred G. Zerbst, Warden
United States Penitentiary
Atlanta, Georgia, Respondent.

No. 1200

HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, AS AFORESAID.

Comes now Allen Collins, petitioner, of legal age, a citizen of the United States, and within the jurisdiction of this Honorable Court, and applies for writ of habeas corpus, assigning the following reasons for his application:

That he is now being wilfully, unlawfully arbitrarily and illegally restrained of his liberty and is incarcerated and imprisoned in the United States Penitentiary, at Atlanta, Georgia, in violation of the laws and the Constitution of the United States of America, by the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, as aforesaid, all within the jurisdiction of this Honorable Court.

The reasons for the illegal, arbitrary imprisonment of the petitioner are two sentences imposed by the Dis-

trict Court of the United States for the Southern District of West Virginia, and on the illegal, unlawful, arbitrary attempt to extend the punishment directed by the Court and seeking to force the petitioner to serve two sentences contrary to direction of the Court and to force the petitioner to serve the two sentences consecutively with no provision for such service made by the Court in either sentence. See Exhibits submitted in Habeas Corpus number 1168.

The first sentence was imposed upon the petitioner by the District Court of the United States on the 16th day of November, 1932, for a term of three years imprisonment in the custody of the Attorney General of the United States, and has been fully served.

The petitioner was again sentenced by the same Court to be imprisoned for a term of one year and one day and a fine of \$100.00, on the 18th day of September, 1935, for which the petitioner was duly committed to the custody of the Attorney of the United States and the same sentence did expire before the 16th day of June, 1937, less regular good time deductions duly earned by the petitioner and provided for by Statute, and an additional 45 days Industrial good time earned by the petitioner in the Industries while serving the last sentence. This should be deducted from the legal expiration date of June 16, 1937, making the sentence expire on the 3rd day of May, 1937, and there being no further legal sentence the petitioner should have been discharged from custody on that date.

The petitioner would show this Honorable Court that he was released from the first sentence by parole

on the 16th day of February, 1934, leaving a balance of twenty-one months of aforesaid sentence not served, which began to run again on the 18th day of September, 1935, when the petitioner was again taken into custody by the Attorney General of the United States on a new charge, said sentence to start on the day it was imposed, in accordance with the judgment of the Court and the laws governing the service of Federal Sentence.

The petitioner would show this Honorable Court that the two sentences were imposed by the same Court and the judgments of the Court do not direct that said sentences are to be served consecutively nor is there any provision for service of said sentence other than the provisions of the law and the general rule on concurrency in the absence of other directions in the judgments of the Court, therefore, the two sentences must be construed to run concurrently.

The petitioner has faithfully served all sentences imposed by the Courts of the United States and seeks relief from further illegal, unlawful, arbitrary imprisonment by writ of habeas corpus.

WHEREFORE: Petitioner prays this Honorable Court to issue a writ of Habeas Corpus, from and under the seal of this Honorable Court, directed to the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Georgia, the respondent to this petition, to have the petitioner before this Honorable Court at such time and place as this Honorable Court may direct, and make an order directing the respondent to this petition to release your petitioner upon such terms and conditions as required by

ALLEN COLLINS, No. 46779-A, *Petitioner.*

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

ALLEN COLLINS, *Petitioner.*

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

AFFIDAVIT IN FORMA PAUPERIS

4.

and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

ALLEN COLLINS, *Affiant.*

Sworn to and subscribed before me this 28th day of April 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

**ORDER GRANTING WRIT IN FORMA
PAUPERIS**

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 8th day of MAY, 1937.

This the 4th day of MAY, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
United States District
Court, Northern Dis-
trict of Georgia,

May 4th, 1937.

J. D. STEWARD, *Clerk,*
By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED)

ANSWER

Now comes the respondent in the above entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the South-

ern District of West Virginia, directing the imprisonment of petitioner for a term of three years. Respondent attaches hereto and makes a part of this response conduct record sheet of petitioner showing computation of his terms of servitude.

It will be noted that petitioner was on Nov. 17, 1932, sentenced to serve three years, on which date his sentence commenced. On Feb. 16, 1934, petitioner was released on parole. While on parole a second sentence was imposed upon petitioner for a term of one year and one day on which day this sentence began to operate. Said sentence of one year and one day is silent as to sequence of service. This sentence with good time deduction expired on June 25, 1936, with the exception that petitioner is required under it to serve an additional thirty days for non-payment of fine.

On Oct. 3, 1935, a parole warrant issued for petitioner, copy of which is hereto attached and made a part of this response. On Sept. 21, 1936, his parole was revoked as is evidenced by certificate of revocation dated Sept. 21, 1936, a copy of which is also attached hereto and made a part of this response. By direction of the Bureau of Prisons in letter dated Nov. 2, 1935, a copy of which is hereto attached and made a part of this response, said parole warrant was lodged against petitioner as a detainer, and he was taken into custody under it at the expiration of the sentence of one year and one day. Said letter further ordered that petitioner be listed for hearing on the violation charge only after he is in custody under said warrant, and that the original warrant be re-

turned to the Bureau with the statement specifically that respondent is holding Collins on the original commitment and as a violator of parole.

Respondent says that the foregoing account states the basis for the detention of petitioner, but that, in any event, the case is not ripe for decision at this time, and even taking petitioner's theory of the case, he will not be eligible for discharge from custody until June 16, 1937. Upon the first sentence of three years, petitioner had, at the time of his reincarceration, 638 days remaining to be served. If the first sentence be tacked to the second sentence, and said 638 days be computed as commencing from June 26, 1936, his full term would expire March 25, 1938. If, however, it be considered as running concurrently with the term last imposed, said 638 days, computed as starting on Sept. 18, 1935, would expire, as is stated above, on June 16, 1937.

Respondent further says that the earliest time discharge could possibly be had is approximately six months distant, and prays that the cause not be allowed to remain pending on the dockets for this period, but that it be dismissed without prejudice to the right of petitioner to file a new application, and again raise the question just a short time prior to the time when the cause of action will ripen. Respondent particularly prays the consideration of the court in this respect in view of the fact that a test case involving the exact point is now pending in the U. S. Circuit Court of Appeals, 5th Circuit, to wit: *Aderhold*,

Warden v. Ingram, and said appeal will undoubtedly be determined during the spring term of said court at New Orleans.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

CONDUCT RECORD

UNITED STATES PENITENTIARY ATLANTA, GEORGIA

Record of Allen Collins Color White No. 46779 Crime Illicit Distilling, etc. Sentence 4 years 1 day. Fine \$100.00 Cost Committed S-W-Va-Charleston. Received Sept. 25, 1935. Nov. 17, 1932. Where convicted S-W-Va-Huntington. Sentenced Sept. 18, 1935. Nov. 17, 1932. Occupation Miner (Coal) Age 53 Sentence commences Sept. 18, 1935. Full term expires March 25, 1938. Residence Champmansville, W. Va. Action of Parole Board Dec. 13, 1935. DENIED Sept. 21, 1936; Parole revoked, earns no good time. WANTED (a) As Parole Violator under Register No. 422020A Previous Criminal Record 11-17-32: As No. 42202 sentenced to 3 years. 3-25-33: Transferred to FPC No. 1. 2-16-34: Paroled from there. 9-18-35; Sentenced to 1 year and 1 day. 9-25-35: Rec'd here as No. 46779. Sentence expired 6-25-36. Has 30 days to serve for fine. 10-3-35: Parole violator warrant issued as No. 42202. Has 638 days to serve effective from 6-26-36.

MITTIMUS

**IN THE DISTRICT COURT OF THE
UNITED STATES
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

THE UNITED STATES

vs.

ALLEN COLLINS

} Indictment No. 6323

The defendant, Allen Collins, having been tried and found guilty as charged in the said Indictment for Ill. Dist. etc., it was ordered that he be fined the sum of \$100.00, and no costs, and be confined and imprisoned in the United States Penitentiary at Atlanta, Georgia, for the period of One Year and one day, and until said fine is paid.

Therefore, this is to command the Marshal of this District to take the body of the said Allen Collins and commit the same pursuant to the above sentence.

WITNESS the Honorable Elliott Northcott, sitting by designation as Judge of the District Court of the United States for the Southern District of West Virginia, this 18th day of September, 1935, and in the 160th year of the Independence of the United States of America.

Attest:

IRA H. MOTTESHEAD, Clerk
D. C. U. S., S. D. W. Va.

THIS PRISONER HAS
BEEN IN MY CUSTODY
FROM DATE OF MITTI-
MUS.

GEORGE P. ALDERSON,
U. S. Marshal.

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal
Process Within the United States:

WHEREAS, Bill Collins, No. 1797-E was sentenced
by the United States District Court for the Southern
District of West Virginia to Serve a sentence of three
years — — — months, and — — — days for the crime of
Illicit Distilling and was on the 16th day of February,
1934, released on parole from the Federal Correctional
Camp, Fort Eustis, Virginia.

AND, WHEREAS, satisfactory evidence having
been presented to the undersigned Member of this
Board that said paroled prisoner named in this warrant
has violated the conditions of his parole, and the said
paroled prisoner is declared to be a fugitive from jus-
tice;

NOW, THEREFORE, this is to command you to ex-
ecute this warrant by taking the said Bill Collins,

wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this third day of October, 1935.

ARTHUR D. WOOD,
Chairman S. Board of Parole

U. S. Penitentiary, Atlanta, Ga.
June 25, 1936

The within named prisoner held in custody under this warrant from this date to serve 638 days, the remainder of the parole delinquent sentence mentioned herein.

A. C. ADERHOLD, *Warden.*

Arthur D. Wood, *Chairman*
Charles Whelan, *M. D.*
T. Webber Wilson

Ray L. Huff
Parole Executive

DEPARTMENT OF JUSTICE

United States Board of Parole

Washington

CERTIFICATE OF REVOCATION

The United States Board of Parole has heard the case of Allen Collins, Register No. 46779-A, United States Penitentiary, Atlanta, Georgia, (Paroled from Federal Correctional Camp, Fort Eustis, Virginia, No. 1797-E) in the matter of violation of parole, and on the

date of this certificate has ordered that the parole heretofore granted (or imposed by Public 210, 72nd Congress) be revoked, and that this prisoner serve the remainder of his sentence originally imposed, as is provided by law.

In witness whereof this certificate bearing the Seal of the United States Board of Parole is issued.

FOR THE UNITED STATES BOARD OF
PAROLE:

RAY L. HUFF,
Parole Executive.

Septemer 21, 1936.

(SEAL)

**LETTER CARR, ACTING PAROLE EXECUTIVE,
OF NOVEMBER 2, 1935.**

**SANFORD BATES, DIRECTOR
DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON**

November 2, 1935.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

In re: Allen Collins, Reg. No. 46779-A.

Former name and number,

Bill Collins, No. 1797-E ZW

Dear Sir:

Enclosed herewith is parole violator warrant in duplicate, together with copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer, and take subject into custody on the warrant at the expiration of his present sentence.

Collins should be listed for hearing on the violation charge only after he is in custody on this warrant.

When you have executed the warrant, please return the original to this office and state specifically that

you are holding Collins on the original commitment and as a violator.

Very truly yours,

RUBY M. CARR,
Acting Parole Executive.

Enc.

Filed Dec. 19, 1936.

(TITLE OMITTED)

**ORDER SUSTAINING WRIT AND
DISCHARGING PETITIONER**

This case came on for hearing and evidence was introduced, argument had and the case considered.

Petitioner filed a former application for writ of habeas corpus in this Court upon the same grounds as set out in the present petition. The writ issued in the former case, however, was discharged because premature, but without prejudice to bringing this proceeding.

As part of the evidence in this case the certified copies of the indictment, sentence and mittimus attached as exhibits to petitioner's former application for writ of habeas corpus were introduced, and there was also introduced in evidence the response filed in the previous application for writ of habeas corpus, with exhibits attached, consisting of the penitentiary con-

duct record sheet of petitioner, the commitment of petitioner to the Atlanta Penitentiary, warrant of arrest of the United States Board of Parole, and a letter of Parole Executive dated November 2nd, 1935.

Upon consideration of the documentary evidence and the parole evidence introduced at the trial, the Court finds that if petitioner's claim that the two sentences ran concurrently is correct, then petitioner's detention is unlawful and he should have been discharged from custody on May 3rd, 1937.

Upon authority of the case of *Kidwell v. Zerbst, Warden*, No. 1192, decided by this Court on May 13th, 1937, the Court finds, the two cases involving substantially the same issues, that the two sentences involved in this case ran concurrently for the reasons set out in the opinion and order of the Court in the *Kidwell* case.

Whereupon it is considered, ordered and adjudged that the writ of habeas corpus be and is hereby sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed May 14th, 1937.

(TITLE OMITTED)

PETITION FOR APPEAL

**TO THE HONORABLE F. MARVIN UNDER-
WOOD, JUDGE OF SAID COURT:**

The above named respondent, F. G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 14th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney..
H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. IT IS FURTHER ORDERED that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 14, 1937.

(TITLE OMITTED)

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney, and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 14th day of May, 1937, is erroneous.

(1). Because the court erred in ruling that the terms

of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the Court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the

prisoner and to compel execution of the unexpired portion of the parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of the respondent and the amendment to the answer, the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the Respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of Respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14th, 1937.

(TITLE OMITTED)

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, do hereby certify that at the trial of the above-stated cause, there was nothing before the court except the petition for habeas corpus with exhibit attached together with the testimony of Ben F. Bates that he is Record Clerk of the United

States Penitentiary at Atlanta, Ga., and that, according to his records, if the two sentences of petitioner be computed as running concurrently, or, in other words, if the contentions set forth in the application for habeas corpus are correct, then petitioner would have been entitled to release from custody on May 3, 1937. Said pleadings and exhibit and the said testimony of Ben F. Bates are hereby settled as the evidence in the case.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED)

PRAECIPE

**TO THE CLERK OF THE ABOVE ENTITLED
COURT:**

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.
2. The return of the respondent with exhibits attached thereto.

- Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

CLERK'S CERTIFICATE

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing 19 pages

contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA

RESPONDENT, *Appellant*,

versus

ALLEN COLLINS, PETITIONER, *Appellee*,

as specified in the praecipe of the counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 25th day of May, A. D., 1937.

J. D. STEWARD,
*Clerk, United States District Court,
Northern District of Georgia,*

By
C. A. McGrew, *Deputy Clerk.*

(SEAL)

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

ALLEN COLLINS

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the
Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932, (47 Stat. 381; 18 U. S. C. A. 716b) prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920, (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920 the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It cannot be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody, the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. *Escue vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and

if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA

v.

ALLEN COLLINS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 24 to 36 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8477, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Allen Collins, is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 23 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 785

**FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER**

vs.

WALTER OWENS

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938**

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8478

FRED G. ZERBST,
WARDEN, UNITED
STATES PENITEN-
TIARY, ATLANTA,
GEORGIA, RESPON-
DENT,

Appellant,

versus

WALTER OWENS,
PETITIONER,

Appellee.

No. 1196

HABEAS CORPUS.

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.
Attorneys for Appellant,

CLINT W. HAGER, ESQ.,
621 Atlanta Nat'l Bank Bldg., Atlanta, Ga.,
Attorney for Appellee.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF
GEORGIA, ATLANTA DIVISION

Walter Owens,

Petitioner,

versus

Fred G. Zerbst, Warden,
United States Penitentiary,
Atlanta, Georgia,

Respondent,

No. 1196

HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE E. MARVIN UNDER-
WOOD, JUDGE OF THE UNITED STATES DIS-
TRICT COURT FOR THE NORTHERN DIS-
TRICT OF GEORGIA, AS AFORESAID:

Comes Walter Owens, Petitioner, of legal age, a cit-
izen of the United States, and within the jurisdiction
of this Honorable Court, and applies for writ of habeas
corpus, assigning the following reasons for his applica-
tion:

That he is now being wilfully, unlawfully, arbitrarily
and illegally restrained of his liberty and is incarcer-
ated and imprisoned in the United States Penitentiary
at Atlanta, Georgia, in violation of the laws and the
Constitution of the United States of America, by the
Honorable Fred G. Zerbst, Warden of the United

States Penitentiary, as aforesaid, all within the jurisdiction of this Honorable Court.

The reasons for the illegal, arbitrary imprisonment of the petitioner are two sentences imposed by the District Court of the United States sitting at Birmingham, Alabama, and on the illegal, unlawful, arbitrary attempt to extend the punishment directed by the Court and seeking to force the petitioner to serve two sentences contrary to direction of the Court and to force the petitioner to serve the two sentences consecutively with no provision for such service made by the Court in either sentence. See exhibits A and B to this petition, which are full, true and certified copies of the Court judgments and sentences, the same being made a part and parcel of this petition as fully as if set out herein in full.

The first sentence was imposed upon the petitioner by the District Court of the United States on the 26th day of June, 1934, for a term of fifteen months imprisonment in the custody of the Attorney General of the United States for an alleged violation of the Interstate Commerce Act, section 409, Title 18 United States Code, and has been fully served.

The petitioner was again sentenced by the same Court on a charge of violation of the Liquor Taxing Act of 1934, and section 345 Revised Statutes, to be imprisoned for a term of fifteen months and to pay a fine of \$100, on the 9th day of March, 1936, for which the petitioner was duly committed to the custody of the Attorney General of the United States and the same sentence did expire on the 10th day of March, 1937, less

regular good time deductions duly earned by the petitioner and provided for by statute, and there being no further legal sentence the petitioner should have been discharged from custody on that date.

The petitioner would show this Honorable Court that he was released from the first sentence by parole on the 27th day of April, 1935, leaving a balance of 151 days of aforesaid sentence not served, which began to run again on the 9th day of March 1936, when the petitioner was again taken into custody by the Attorney General of the United States and expired on the 7th day of August, 1936, in accordance with the judgment of the Court and the laws governing the service of Federal sentences.

The petitioner would show this Honorable Court that the two sentences were imposed by the same Court and the judgments of the Court do not direct that said sentences are to be served consecutively nor is there any provision for service of said sentences other than the provisions of the law and the general rule on concurrency in the absence of other directions in the judgments of the Court, therefore the two sentences must be construed to run concurrently, (see exhibits A and B to this petition).

The petitioner would show this Honorable Court that the Clerk of the Trial Court erred when entering in the latter commitment that the petitioner is to be held for non payment of the fine of \$100.00, assessed by the Court without any direction for such commitment and

imprisonment by the Court. (See exhibit B to this petition).

The petitioner has faithfully served all sentences imposed by the Courts of the United States and seeks relief from further illegal, unlawful, arbitrary imprisonment by writ of habeas corpus.

WHEREFORE: Petitioner prays this Honorable Court to issue a writ of Habeas Corpus, from and under the seal of this Honorable Court, directed to the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Georgia, the respondent to this petition, to have the petitioner before this Honorable Court, at such time and place as this Honorable Court may direct, and make an order directing the respondent to this petition to release your petitioner upon such terms and conditions as required by law, and as may be ordered by this Honorable Court, that the petitioner may have his liberty to go hence without day, as in duty bound he will ever pray, Etc.

WALTER OWENS, *Petitioner.*

AFFIDAVIT

COUNTY OF FULTON,)

) ss

STATE OF GEORGIA.)

Personally appeared before me, a notary public, Walter Owens, who being by me first duly sworn, on his oath says that he is the identical Walter Owens, who signed the foregoing petition, and that the matters and things set out therein and each of them are true

and correct to the best of his knowledge and belief, and that he believes that he is entitled to the redress he seeks therein, and that this petition expires that full and complete justice may be done in the premises.

WALTER OWENS, *Affiant*.

Sworn to and subscribed before me this 14th day of April, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.
(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

WALTER OWENS, *Affiant*.

Sworn to and subscribed before me this 14th day of April, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.
(NOTARIAL SEAL)

**ORDER GRANTING WRIT IN FORMA
PAUPERIS**

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me, at Atlanta, Georgia, at 10 o'clock a. m., on the 17th day of April, 1937.

This the 16th day of April, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

EXHIBIT "A"—COURT RECORD

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DIVISION OF
THE NORTHERN DISTRICT OF ALABAMA.

MONDAY, JUNE 25TH, 1934

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable W. I. Grubb, United States District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Thos. J. Kennamer, United States Marshal, and W. S. Lovell, Clerk.

8634 UNITED STATES

versus

WALTER OWENS, alias
BIG CHIEF

This cause coming on to be heard, this day, comes the United States by District Attorney, comes also the de-

fendant in his own proper person and by counsel, and being arraigned in open court upon the Indictment filed herein against him, charging an alleged violation of Section 409 Title 18 United States Code—theft from interstate shipment of freight, pleads not guilty thereto and, for defense, throws himself upon this country as does also the United States Attorney.

To try this cause comes a jury of good and lawful men, to wit, A. J. Phillips and eleven others duly impaneled, charged and sworn and the trial of this cause is begun.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this cause be and is hereby continued until tomorrow morning.

TUESDAY, JUNE 26TH, 1934

This being the day and hour to which this cause was on yesterday continued, come again the parties hereto, the United States by District Attorney, comes also the defendant in his own proper person and by counsel, comes also the jury heretofore selected, impaneled, charged and sworn and the trial of this cause is resumed.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court the following verdict, which was read by the clerk in the presence of the defendant, to-wit: "We the jury find the defendant,

EXHIBIT "B"—COURT RECORD

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT OF ALABAMA

MONDAY, MARCH 9TH, 1936

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable David J. Davis, United States District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Alex Smith, United States Marshal, and W. S. Lovell, Clerk.

9206 UNITED STATES OF AMERICA)
VS)
WALTER OWENS)

This cause coming on to be heard, this day, comes the United States of America by District Attorney, comes also the defendant in his own proper person, and being arraigned in open court upon the Indictment filed herein against him, charging an alleged violation of Liquor Taxing Act of 1934, and Section 3450 Revised Statutes, transporting distilled spirits without the immediate containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits, and evidencing the payment of all Internal Revenue taxes imposed by law, removing, depositing and concealing distilled spirits on which a tax was imposed with the in-

Thereupon the defendant being inquired of and showing no good or sufficient cause why sentence should not be pronounced upon him.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF ALABAMA)

I, Chas. B. Crow, Clerk of the United States District Court in and for the Northern District of Alabama, do hereby certify that the annexed and foregoing is a true and full copy of the original Court Record showing plea of guilty and sentence in the matter of United States of America vs. Walter Owens, Number 9206, Southern Division, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto
 subscribed my name and affixed the seal of the

aforesaid Court at Birmingham, Ala. this 29th day of March, A. D. 1937.

(SEAL)

CHAS. B. CROW,
Clerk.

Filed in Clerk's Office United States District Court, Northern District of Georgia, April 16th, 1937.

J. D. STEWARD, *Clerk,*

By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED).

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the Northern District of Alabama. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner. The first sentence was rendered by the U. S. District

Court for the Northern District of Alabama, and ordered the imprisonment of petitioner for a term of fifteen months. On April 27, 1935, petitioner was released on Parole. On March 20, 1936, petitioner was returned to the institution with a new sentence imposed by the same court, and directing incarceration for fifteen months. On April 23, 1936, the predecessor in office of your respondent received a letter dated April 20, 1936, signed by Ray L. Huff, Parole Executive, enclosing a parole warrant for petitioner for violation of the parole granted under his first sentence. Said letter further directs that the said warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioner's case.

On March 10, 1937, the second sentence of two years expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 151 days if his parole be revoked.

Respondent does not, of course, maintain that there are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copies of mittimus of the U. S. District Court for the Northern District of Alabama,

of parole warrant signed by Arthur D. Wood, Chairman of the U. S. Board of Parole, of the return thereof, and of letter dated April 20, 1936, signed by Ray L. Huff, Parole Executive, addressed to Mr. A. C. Aderhold, Warden, U. S. Penitentiary, Atlanta, Ga., said exhibits being marked "A", "B", "C", and "D" respectively. Respondent also attaches hereto and makes a part of this response copy of conduct record sheet for the convenience of the court, which tabulates the computation of petitioner's terms of imprisonment, same being marked "D".

Wherefore, having fully answered, respondent prays the judgment of the court.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent.

EXHIBIT "A"—COMMITMENT
IN THE DISTRICT COURT OF THE
UNITED STATES OF AMERICA
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

The President of the United States of America—

To the Marshal of the United States for the Northern
District of Alabama and to the Warden of the
United States Penitentiary at Atlanta, Georgia,
GREETING:

Whereas, at the March term of said Court, 1936, held at Birmingham, Ala. in said district and division, to wit, on March 9th, 1936, WALTER OWENS was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for and during the term and period of fifteen (15) months beginning on the date on which he is received at the (Penitentiary) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; and to pay a fine to the United States in the sum of \$100.00 not to stand committed until such fine shall be paid, or until he shall be otherwise discharged by due course of law, for violation of LIQUOR TAXING ACT OF 1934 (Sec. 267 Title 26 USCA) AND SEC.

3450 R. S. Did transport distilled spirits without the immediate containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits, and evidencing the payment of all Internal Revenue taxes imposed by laws; conceal, remove and deposit distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax.

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said WALTER OWENS shall be served.

Now, this is to command you, the said Marshal, forthwith to take the said WALTER OWENS and him safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said WALTER OWENS and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable David J. Davis Judge of said Court, and the seal thereof, affixed at Birmingham, Alabama, in said district, this 10th day of March, 1936.

W. S. LOVELL, *Clerk.*

JAMES L. PUGH, *Deputy Clerk.*

A TRUE COPY:

W. S. LOVELL, CLERK.

U. S. DISTRICT COURT

NORTHERN DISTRICT OF ALA.

By JAMES L. PUGH

DEPUTY CLERK

RETURN

I have executed the within writ in the manner following, to wit: On March 9, 1936 I delivered said WALTER OWENS to the Warden of the Jefferson County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on MAR. 20, 1936, I delivered said WALTER OWENS to the Warden of U. S. Penitentiary at Atlanta, Georgia, together with a copy of this commitment.

ALEX SMITH

United States Marshal.

By B. W. GUNTER

Deputy.

I hereby certify that the within named Federal Prisoner was committed to the Jefferson County Jail, Birmingham, Alabama, and began serving sentence in this case on this the 9th day of March, 1936.

ALEX SMITH,

United States Marshal.

EXHIBIT "B"

**DEPARTMENT OF JUSTICE
WASHINGTON, D. C.**

WARRANT

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal
Process Within the United States:

WHEREAS, Walter Owens, 344611-A was sentenced by the United States District Court for the Northern District of Alabama to Serve a sentence of ——— years 15 months, and ——— days for the crime of violating the Interstate Commerce Act and was on the 27th day of April, 1935, released on parole from the U. S. Penitentiary, Atlanta, Georgia..

AND, WHEREAS, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is declared to be a fugitive from justice;

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Walter Owens, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this
24th day of September, 1935.

When apprehended communicate

with Director, Bureau of Prisons
for instructions.

ARTHUR D. WOOD
Chairman Member, U. S. Board of Parole.

(SEAL)

U. S. Penitentiary,
Atlanta, Ga.
March 11, 1937.

The within named Walter Owens completed a fifteen-months sentence on March 10, 1937, which sentence was imposed March 9, 1936, and was retained in custody as a parole violator under sentence of fifteen months imposed June 28, 1934,—the unserved portion of said sentence being 151 days.

FRED G. ZERBST, *Warden.*

EXHIBIT "C"—LETTER, HUFF, PAROLE

EXECUTIVE, APRIL 20, 1936.

DEPARTMENT OF JUSTICE

BUREAU OF PRISONS

WASHINGTON

April 20, 1936.

Mr. A. C. Aderhold,
Warden,
U. S. Penitentiary,
Atlanta, Georgia.

In re: Walter Owens,
old No. 44611-A
new No. 47980-A (ZW)

Dear Sir:

Enclosed herewith is parole violator warrant, in duplicate, and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Owens into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office stating specifically that you

are holding Owens as a parole violator and on the original commitment.

Very truly yours,

RAY L. HUFF

Parole Executive.

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA.

EXHIBIT "D"—CONDUCT RECORD

Record of Walter Owens Color Black No 47980 alias "Big Chief"; Walter Lewis Crime Vio. Internal Revenue Laws (Transporting & Concealing Liquor). Sentence 15 months. Fine \$100.00 Cost None Not Committed Received Mar. 20, 1936 Where convicted N-Ala-Birmingham Sentenced Mar. 9, 1936 Occupation Barber Age 45 Sentence commences Mar. 9, 1936 Full term expires June 8, 1937 Good time allowance 90 days. Short term expires Mar. 10, 1937. Residence, Birmingham, Ala. Action of Parole Board 9-16-36 did not file. Eligible for parole Aug. 8, 1936 WANTED to be held at expiration of sentence under Reg. No. 47980 for service of remainder of sentence as parole violator under No. 44611-A, and listed for hearing at next Board following expiration of instant sentence, at which time parole violator warrant is to be executed—see letter 4-20-36.

6-26-34—sentenced to 15 months. 6-29-34—Received as No. 44611. 4-27-35—Paroled; 9-24-35 declared parole violator. 3-10-37—Sentence expired as No. 47980.

3-11-37—in custody to serve remainder of 1st sentence as register No. 44611, has 151 days to serve, if parole be revoked.

Filed April 26, 1937.

(TITLE OMITTED).

**ORDER SUSTAINING WRIT AND
DISCHARGING PETITIONER**

The above case came on for hearing and was duly heard and considered.

This case involved the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192, Habeas Corpus, this day decided, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst*, and upon authority of same:

It is considered, ordered and adjudged that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This May 13th, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed May 13th, 1937.

(TITLE OMITTED).

PETITION FOR APPEAL

**TO THE HONORABLE E. MARVIN UNDER-
WOOD, JUDGE OF SAID COURT:**

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,

United States Attorney

HARVEY H. TYSINGER,

Assistant U. S. Attorney

Filed May 14th, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed May 14, 1937.

(TITLE OMITTED).

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the parole sentence or first sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of

the respondent, the Court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

Wherefore the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
United States Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14, 1937.

(TITLE OMITTED).

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the case was tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits annexed and the return of the respondent with exhibits attached, together with the testimony of Ben F. Bates, who testified that he is Record Clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's sentences substantially as they are set out

in the return, and further that the writ of habeas corpus is not premature, but that if the terms be computed as running concurrently, or, as petitioner alleges in his petition they should be, then petitioner would have been eligible for release from custody on March 10, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the cause.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED).

PRAECIPE

**TO THE CLERK OF THE ABOVE-ENTITLED
COURT:**

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.
2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of court of May 13, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignments of errors.
7. This praecipe.

LAWRENCE S. CAMP,
United States Attorney

Filed May 14, 1937.

gia, do hereby certify that the foregoing and attached 23 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED
STATES PENITENTIARY, ATLANTA,
GEORGIA, RESPONDENT, *Appellant*,

versus

WALTER OWENS, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 28th day of May, A. D. 1937.

(SEAL)

J. D. STEWARD,

*Clerk, United States District Court,
Northern District of Georgia.*

By

C. A. MCGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6th, 1937

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

WALTER OWENS

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: The eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had

expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b) prisoners granted a reduction of sentence for good

conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717) upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various

boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detainee not by virtue of the warrant of commitment, but on account of the judgment and

sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escove vs. Zerst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner

in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified; and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

WALTER OWENS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 29 to 41 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8478, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Walter Owens is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 28 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,
*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 786

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

FRANK PEEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8495

FRED G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEOR-
GIA, RESPONDENT,

Appellant, No. 1215

HABEAS CORPUS

versus

FRANK PEEL, PETI-
TIONER,

Appellee.

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,

United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

Attorneys for Appellant

CLINT W. HAGER, ESQ.,

621 Atlanta National Bank Bldg., Atlanta, Ga.,

Attorney for Appellee.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your petitioner, Frank Peel, and presents this his petition for the Writ of Habeas Corpus and shows this Honorable Court the following facts:

That he is now detained and imprisoned in the United States Penitentiary, Atlanta, Georgia in the custody of Fred G. Zerbst, Warden of said Penitentiary by color of authority of the United States and within the jurisdiction of the United States District Court for the Northern District of Georgia.

That at the October term, 1935 held at Covington, Kentucky, for the Eastern District of Kentucky, an indictment was returned against your petitioner consisting of two counts, both alleging a violation of Title 26, Sections 281 and 306.

That after entering a plea of guilty to said indictment your petitioner, on October 24th 1935, was sentenced to be committed to the custody of the Attorney General or his authorized representative for confinement in an institution of the Penitentiary type for a period of two years and to pay a fine of one hundred dollars.

Your petitioner would now show this Honorable Court by reason of deduction allowed under authority of Title 18, Section 710 for good conduct, his sentence expired June 1st, 1937 and that he is now detained and imprisoned illegally and unlawfully, in the custody of Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, by virtue of a purported parole warrant issued by the United States Board of Parole,

Washington, D. C., alleging a violation of your petitioners parole which he had been given on a previous sentence.

It is contended by your petitioner in the absence of specific instructions to the contrary, that the unserved portion of his parole period runs concurrently with the two year sentence imposed upon him October 24th, 1935.

A certified copy of the indictment, judgment, of the Court and commitment, covering the sentence of two years, which your petitioner has completed, are attached hereto and respectfully requested to be made a part and parcel of this petition.

Your petitioner, is unable to furnish this Honorable Court with a copy of the purported parole warrant, therefore he respectfully requests that a copy of same be furnished this Court by the respondents.

Your petitioner contends the case at bar comes clearly within the ruling of *Aderhold v. M. McCarthy* 65 F. (2d) 791 in which case the Circuit Court of Appeals, for the Fifth Circuit, held that the serving of a warrant was immaterial, when the prisoner was already in custody. In view of this ruling and particularly the absence from the judgment of any specific instructions as to what sequence the sentence and remaining portion of the parole are to be served.

Your petitioner contends the remaining portion of his parole began to toll with the imposition of the two years sentence on October 24th, 1935.

And to further detain and imprison your petitioner

would be depriving him of his constitutional rights. Wherefore your petitioner prays that the writ of Habeas Corpus issue directed to Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, to bring and have your petitioner before this Honorable Court at a time so directed by this Court, together with the true cause of his restraint and detention so that this Court may proceed in a summary way to determine the legality of his detention and dispose of your petitioner as the law and justice may demand, and your petitioner will ever pray, and etc.

FRANK PEEL, *Petitioner.*

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

Your petitioner Frank Peel first being duly sworn deposes and says that he has read the foregoing petition, that all the allegations contained therein are true, except those that stated upon information and these he believes to be true and that he is entitled to the redress sought therein.

FRANK PEEL,

Affiant.

Sworn and subscribed to before me this 1st day of June 1937.

ERNEST D. ETHERIDGE,
Notary Public, State of Georgia.
(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Comes now your petitioner, Frank Peel, who is a citizen of the United States of America or was a citizen before alleged charge of crime, of legal age, and who is now detained and imprisoned in the United States Penitentiary, Atlanta, Georgia, and within the jurisdiction of the United States District Court for the Northern District of Georgia, that he wishes to bring an action to test the legality of his imprisonment, but because of his poverty, he is unable to pay the costs or give bond in lieu thereof.

Wherefore, your petitioner, respectfully requests that he be permitted to prosecute said action in forma pauperis.

FRANK PEEL,
Affiant.

Sworn and subscribed to before me this 1st day of June, 1937.

ERNEST D. ETHERIDGE,
Notary Public, State of Georgia.

(NOTARIAL SEAL)

ORDER GRANTING WRIT IN FORMA PAUPERIS

• Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta,

Georgia, at 10:00 o'clock a. m. on the 5th day of June, 1937.

This the 3rd day of June, 1937.

E. MARVIN UNDERWOOD,

U. S. Judge.

NOTE:

Exhibits omitted.

Filed in Clerk's Office, United States District Court,
Northern District of Georgia, June 3rd, 1937.

J. D. STEWARD, *Clerk,*

By W. L. NEESE, *Deputy Clerk.*

ANSWER

Now comes the respondent in the above-entitled proceeding, and, in obedience to the *writ of habeas corpus*, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Eastern District of Kentucky. Also attached hereto and made a part hereof is a copy, marked "Exhibit A", of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary, showing respondent's computation of pe-

tioner's period of servitude. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment for the incarceration of petitioner, both having been issued by the U. S. District Court for the Eastern District of Kentucky, and each commanding imprisonment for a term of two years. Petitioner was first committed to the institution under the mittimus referred to above. While serving this sentence, he was on April 18, 1935, released on parole. On Nov. 8, 1935, he was returned to the institution with a new sentence of two years as evidenced by warrant of commitment, copy of which, marked "Exhibit B," is annexed hereto and by reference incorporated in this return.

Afterwards petitioner was declared a parole violator, and warrant of the Parole Board issued for his retaking, dated, Nov. 21, 1935, a copy of which, marked "Exhibit C," is hereto annexed and by reference made a part of this return. In letter dated Jan. 4, 1936, signed by Ray L. Huff, Parole Executive, transmitting this warrant, respondent was directed that the warrant be placed as a detainer, and that petitioner be taken into custody on it at the expiration of the second sentence of two years. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with.

On June 1, 1937, the second sentence of two years expired, and petitioner was served with the aforesaid

parole warrant, and is now held under it to await the action of the next meeting of the board of Parole.

Respondent does not attempt to controvert the fact that both warrants of commitment are silent as to sequence of service, but it must be conceded upon the face of the record that there are no directions in either mittimus as to concurrent or consecutive service. Respondent merely asserts that, the parole warrant having never been executed, and the Parole Board having never heard petitioner's case on the question of revocation of parole, and the parole warrant having been retained throughout this period as a detainer, the unexpired portion of petitioner's first sentence still remains unsatisfied, and the Parole Board is not without jurisdiction to restrain petitioner under the aforesaid parole warrant, and to revoke his parole at the next meeting of the board, or take such other action as it sees fit.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney.

Counsel for Respondent

STATE OF GEORGIA)
FULTON COUNTY)

Personally before me, the undersigned officer duly authorized to administer oaths, appeared B. F. Bates, who on oath deposes and says that he is Record Clerk of the United States Penitentiary at Atlanta, Ga., that he has read the contents of the foregoing return, and that the statements therein averred are true, accurate and correct according to his best knowledge and belief and according to the records of said penitentiary. Depo-
nent further says that if the contentions of petitioner be taken as true, and his two sentences of imprisonment be construed as running concurrently, then the writ of habeas corpus is not premature, but that petitioner's term of servitude would expire on June 1, 1937.

B. F. BATES.

Subscribed and sworn to before me,
this 5th day of June, 1937.

HARRY MOSES,

Notary Public, Georgia, State at Large.

**EXHIBIT "A" — CONDUCT RECORD
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA :**

Record of Frank Peel, Color White, No. 47063. Crime
Illicit Distilling. Sentence, 2 years. Fine \$100.00 Costs.
Not Committed. Received 11-8-35. Where convicted,

E-Ky-Covington. Sentenced 10-24-35. Occupation, Auto Mechanic. Age 29. Sentence commences 10-24-35. Full term expires 10-23-37. Good time allowance, 144 days. Short term expires 6-1-37. Residence, Florence, Ky. Action of Parole Board—6-22-36 Did not file Eligible for parole 6-23-36. WANTED to be held at expiration of instant sentence for service of remainder of sentence as No. 2379, as parole violator from FRC, Petersburg, Va. 2-22-36 — Corrected commitment received showing fine and costs not committed.

COMMITMENT

DISTRICT COURT OF THE UNITED STATES EASTERN DISTRICT OF KENTUCKY

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Marshal of the United States for the Eastern
District of Kentucky—GREETING:*

WHEREAS, at the October term of said Court, 1935, held at Covington, Kentucky, in the said district, to wit, on October 24, 1935, Frank Peel was sentenced by said Court, upon his Plea of Guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in an institution of the Reformatory or Penitentiary type, for and during the term or period of Two Years beginning October 24, 1935 and to pay a fine to the United States in the sum of \$100.00 and costs for having carried on the business of a distiller with intent to de-

fraud the United States, and having in possession an unregistered still in violation of Title 26, Sections 306 and 281 U. S. C. A.

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take the body of the said Frank Peel and commit the same pursuant to the above sentence.

WITNESS, The HONORABLE H. CHURCH FORD, Judge of the District Court of the United States for the Eastern District of Kentucky, this 24 day of October, A. D. 1935.

A. B. ROUSE,
Clerk

By Florence Dunham,
Deputy Clerk.

This commitment received Feb. 22, 1936—Atlanta, Georgia.

RETURN

I have executed the within writ in the manner following, to wit: On October 24, 1935, I delivered the said Frank Peel to the Jailor of the Newport City Jail temporarily, pending transfer to the institution designated for the service of sentence, and on November 8, 1935 I delivered said Frank Peel to the Warden of U. S. Pen-

5
itentiary at Atlanta, Ga., together with a copy of this commitment.

J. M. MOORE,
U. S. Marshal, Eastern District of Kentucky

By WINTER NEAL,
Deputy.

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

*To any Federal Officer Authorized to Serve Criminal
Process within the United States:*

WHEREAS, Frank Peel, No. 2379-Lee was sentenced by the United States District Court for the Eastern District of Kentucky to serve a sentence of two years, months, and days for the crime of violating the internal Revenue Act and was on the 18th day of April, 1935, released on parole from the Federal Reformatory Camp, Petersburg, Virginia.

AND, WHEREAS, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the

said paroled prisoner is declared to be a fugitive from justice:

NOW THEREFORE, this is to command you to execute this warrant by taking the said Frank Peel, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 21st day of November, 1935.

ARTHUR D. WOOD,

Chairman, U. S. Board of Parole.

Warrant having been issued as above you are hereby directed to commit said Frank Peel to U. S. Penitentiary, Atlanta, Georgia, which is hereby designated as the place of his further confinement.

By direction of the Attorney General

SANFORD BATES,

Director, Bureau of Prisons.

Filed June 5, 1937.

(TITLE OMITTED.)

AMENDMENT TO RETURN

Now comes respondent and with leave of the Court amends his return heretofore filed, and says that if the contentions set out in the application for *habeas corpus* be taken as true, and his two sentences of imprisonment

be construed as running concurrently, the *writ of habeas corpus* is not premature, and computed on this basis, petitioner's term of servitude would have expired June 1, 1937.

H. T. NICHOLS,
Assistant U. S. Attorney

ORDER

The foregoing amendment to return is hereby allowed. This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5, 1937.

**ORDER SUSTAINING WRIT OF HABEAS
CORPUS AND DISCHARGING PE-
TITIONER FROM CUSTODY**

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192 *Habeas Corpus*, decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and

order filed in the case of *Kidwell v. Zerbst*, and upon authority of same;

IT IS CONSIDERED, ORDERED and ADJUDGED that the *writ of habeas corpus* be and hereby is sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired. Provided, however, respondent shall perfect an appeal sooner than the three day limit, then respondent is ordered and directed to release petitioner when he shall have made an appearance bond in said appeal.

This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5th, 1937.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above-named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above-stated cause of the 5th day of June, 1937, wherein the *writ of habeas corpus* was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States

Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent.

Filed June 5, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. **IT IS FURTHER**

ORDERED that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00 without sureties.

Dated this 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 5, 1937.

ASSIGNMENT OF ERRORS

And now on this 5th day of June, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 5th day of June, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2.) Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3.) Because the court erred in not ruling that the commission of a new federal crime by the parolee would

not absolve the parolee from penalty for violation of parole.

(4.) Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7). Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining the writ of *habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District

Court be directed to discharge said *writ of habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed June 5, 1937.

JUDGES CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the sole evidence consisted of the application for *habeas corpus* with exhibits attached and the return of the respondent with exhibits annexed, and said pleadings are settled as the evidence in the cause.

This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

You will please prepare transcript of record in this

cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for *habeas corpus* omitting exhibits attached thereto, and order allowing the same.
2. The return of the respondent and amendment thereto with exhibits attached thereto.
3. The judgment and order of court of June 5th, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney,

H. T. NICHOLS,
Assistant U. S. Attorney.

Counsel for Respondent.

Filed June 5, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 19 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, RE-
SPONDENT, *Appellant*,

versus

FRANK PEEL, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service hereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I here-
unto subscribe my name and affix the seal

of the said District Court, at Atlanta,
Georgia, this the 10th day of June, A. D.,
1937.

(SEAL)

J. D. STEWARD,
*Clerk, United States District Court,
Northern District of Georgia,*

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record,
the original thereof being on file in the office of the
Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6th, 1937

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA

v.

FRANK PEEL

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in Federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting trans-

portation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A., § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said

prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A., 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to

run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escue vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concur-

rently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, thought not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their

old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

FRANK PEEL

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 23 to 35 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8495, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Frank Peel is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 22 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 787

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

BENNIE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8516

F. G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEOR-
GIA, RESPONDENT,

Appellant,

versus

BENNIE JONES, PETITION-
ER,

Appellee.

No. 1229

HABEAS CORPUS

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,

United States Attorney, Atlanta, Ga.,

HARVEY H. TYSINGER, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

Counsel for Appellant,

BENNIE JONES, 403 Meridian St., Huntsville, Ala.,
In Propria Persona.

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THE UNITED STATES OF AMERICA
IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BENNIE JONES

vs.

F. G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEOR-
GIA, RESPONDENT.

No. 1229

HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Bennie Jones, hereinafter referred to as petitioner, relator, respectively shows to this Honorable Court and alleges:

(1) That relator is confined in the United States Penitentiary, at Atlanta, Georgia, and deprived of his liberty, and that he is in charge of F. G. Zerbst, as Warden of said penitentiary, in contravention of relator's rights as guaranteed by the Constitution of the United States.

(2) That relator is a citizen of the United States, and is entitled to the full protection of the provisions of the Constitution, and more particularly the provisions

thereof which guarantee that no citizen shall be deprived of his liberty without due process of law.

(3) That the cause or pretense pursuant to which your relator is confined in said penitentiary and deprived of his liberty is a certain mittimus or order of judgment, witnessed, signed, and entered on the 9th day of April, 1936 A. D. in the year of our Lord, By the Honorable David J. Davis, United States District Judge, in and for the Northern District of Alabama, at Huntsville Division;

(4) That your relator was indicted by the Grand Jurors of the United States in and for the Northern District of Alabama, April term, and charged with the theft of interstate shipment; entered a plea of not guilty, represented by Council Walter Price, Attorney at Law, at Huntsville, Alabama, and was found guilty by a jury and sentenced to 18 months on the 9th day of April, 1936 A. D. in the year of our Lord.

Petitioner:

(1) Contends he should have served both sentences concurrently; relator further states that he entered a plea of guilty in the year of 1934 A. D., and was given a sentence of 22 months in May of 1934 in the year of our Lord. Relator served 17 months and 18 days and was released on conditional release. Relator further states that he has now served on the latter sentence 13 months and 22 days, which was imposed by the Honorable Judge on April 9, 1936. The relator further states that he is unable to secure the indictments of the two sentences. The sentence that was imposed upon the relator in 1934 by the Honorable Judge Grubb (deceased

ed). The relator further states that he has tried to secure the indictments through a pauperis oath. The relator feels that he should be released on a *writ of habeas corpus* proceedings.

The powers of the United States Courts are statutory Courts, the creators of Congress, consequently, if the Court sentence on your relator under such powers and specifically conferred by Congress. Then the sentence, as imposed, on your relator is void, and null. And he must be released therefore.

Expart Sullivan 10 Okla. C. R. 465. 138.

P. 815, *Ann Cas.* 1916 A 716.

The Court said; *Habeas Corpus* will lie to enquire into the legality of the imprisonment of a person on a void commitment or without due process of law, and to secure his discharge from custody, where he is held, in violation of his Constitutional rights.

Habeas Corpus, remedy on void judgment if a person be imprisoned on a void committment sentence, and judgment he will be released by Habeas Corpus proceeding; Hughes Criminal law, 1926—and case cited josllins criminal law 513—sec 22, *People v. Whitson* 74 I 1123 *Exparte Clark*. 126. Gal 235. Pac 546.46 L. R. A. 656. *People v. Stock*. 157 N. Y. 681.

In release. 98 F E d 984.

Habeas Corpus must be granted, when one is detained under a defective committment. See *Republic etc. and Bynum*—*Dallas Tetas* 376. In the case of *Matters*

v. Ryan (249 V. S. 375, 39, S. C. T. 315, 63 I. E. D, 654.) The Court holds that the *writ of habeas corpus* is a summary means of obtaining justice. But is a real guarantee of the rights of the individual citizen. The appellant had a right of direct appeal, but it is a well established rule in similar cases that where the sentence is found to be void, the original courts, may assume jurisdiction, at any time after the sentence has been imposed, and issue a judgment in accordance with the law. But if the prisoner were to be released, on *Habeas Corpus*, and the Court loose jurisdiction over him, it were better to release several prisoners, from serving their just punishment than to weaken the efficiency of the writ.

That it would be without force. When invoked by some one. Whose real rights were substantially infringed. Wherefore, Relator prays to this Honorable Court to issue a *writ of habeas corpus* in usual form provided by law and statute in such cases made and provided, directed to said Hon. Fred G. Zerbst as Warden of the United States penitentiary, at Atlanta, Georgia, directing that he produce the body of your petitioner before this court at a time, and place therein stated, there to be heard; why he should not be discharged from the custody of said Warden, and for such other, and further relief, as to this Honorable Court may seem just, and proper in the premises. And that your relator will ever pray.

Respectfully submitted,

BENNIE JONES,

48111-A. *Petitioner.*

COUNTY OF FULTON)
STATE OF GEORGIA)ss

AFFIDAVIT

Personally appearing before me, Bennie Jones, who first being duly sworn, deposes and says he has read the foregoing petition, that he knows the contents and allegations sustained therein are true as to such matters as are stated upon information and belief, and this he verily believes to be true, and that he verily believes that he is entitled to the redress sought therein.

BENNIE JONES

Subscribed and sworn to before me, this the 18 day of June Nineteen Hundred and Thirty Seven, A. D.

ERNEST D. ETHERIDGE,
Notary Public—State At Large, Atlanta, Ga.

(NOTARIAL SEAL)

(TITLE OMITTED.)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia; and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court, to test the legality of his said imprisonment, and deten-

tion; but that because of his poverty he is unable to pay the cost of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

Wherefore; Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

BENNIE JONES,
No. 48111-A. *Affiant.*

Sworn to and subscribed before me 6-18-37.

ERNEST D. ETHERIDGE,
Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

**ORDER GRANTING WRIT IN FORMA
PAUPERIS**

Read and considered. Let the writ issue as prayed, in *forma pauperis*, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 26th day of June, 1937.

This the 24th day of June, 1937.

E. MARVIN UNDERWOOD, *U. S. Judge.*

Filed June 24th, 1937

(TITLE OMITTED.)

ANSWER

Now comes the respondent in the above-entitled proceeding, and, in obedience to the *writ of habeas corpus*, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Northern District of Alabama, directing imprisonment for a period of twenty-two months. A copy of said warrant of commitment is hereto attached and made a part of this return, being marked "Exhibit A". Also attached hereto and incorporated by reference herein is copy, marked "Exhibit B," of petitioner's conduct record sheet, showing respondent's computation of petitioner's period of servitude.

Further answering, respondent says that petitioner was originally committed to the U. S. Industrial Reformatory at Chillicothe, Ohio, under the mittimus marked "Exhibit A." This term was executed in full less deduction for good time, and petitioner was given a conditional release in accordance with the provisions of Section 716b, Title 18, United States Code. Afterwards, he was returned to the penitentiary with a new sentence of eighteen months which was also imposed by the U. S. District Court for the Northern District of Alabama. This sentence began on April 9, 1936, and has now been completely served and executed. Petitioner was confined for the duration of this sentence in the

Federal Reformatory Camp at Petersburg, Virginia. A copy of the mittimus under which petitioner was committed to the Petersburg Prison Camp in the case of the eighteen months sentence is hereto annexed and made a part hereof and marked "Exhibit D."

On March 17, 1936, a parole warrant issued for petitioner's arrest for violation of his conditional release, a copy of which is hereto attached, marked "Exhibit C", and is by reference incorporated in this return. This warrant was never served or executed upon petitioner until after satisfaction of the said eighteen months sentence, but was kept in the files as a detainer, or, we might say, it was lodged at the prison as a detainer. The entry upon the conduct record sheet annexed is significant, which is to the effect that the Parole Board instructed the Warden on May 28, 1936, that after expiration of the second sentence of eighteen months, petitioner as a conditional release violator under Register Number 9616-C is to be held in custody under warrant issued March 17, 1936, return to be entered on warrant and same forwarded to the Parole Board, and revocation to be had at the first meeting of the Board after expiration of said eighteen months sentence. The instructions of the Parole Board were complied with by the prison authorities, and after completion of the eighteen months sentence, the parole warrant was served upon petitioner, he was taken into custody under it, or rather, his custody was continued under it, and he has been taken before the Parole Board, and given a hearing on the question of revocation of his conditional release. This hearing was had on June 26, 1937, and as is the usual practice, the hearing was had before one member of the Board, the evidence

was taken, the recommendation of the Board member was made, and the entire case was continued to a meeting of the full Board, or for consideration by the entire Board at a later time in Washington, D. C., but no final action has yet been taken by the Board.

It will be noted from the return to the parole warrant attached as "Exhibit C," that on June 22, 1937, petitioner completed the second sentence of eighteen months, and is now being held in custody as a conditional release violator to complete the sentence of twenty-two months under which he was conditionally released on Nov. 13, 1935. The conditional release time of petitioner amounted to 132 days.

Since but 132 days remain to be served upon the first sentence, if, as petitioner claims, his two sentences should be construed as running concurrently, the eighteen months term would obviously be the longer time, and we are obliged to admit that the writ would not be premature. Respondent merely contends that the jurisdiction of the Parole Board has not been exhausted, and that its power to revoke petitioner's parole or conditional release is not ousted by reason of the fact that the eighteen months sentence supervened before it

has heard petitioner's case on the question of revocation of conditional release time.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

Filed June 29, 1937.

EXHIBIT "A"

COMMITMENT

**IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

The President of the United States of America—

To the Marshal of the United States for the Northern District of Alabama and to the Superintendent of

the U. S. Industrial Reformatory at Chillicothe, Ohio,

GREETING:

Whereas, at the Adj. March term of said Court, 1934, held at Birmingham, in said district and division, to wit, on May 25th, 1934, BENNIE JONES, alias Ben A. Jones, alias Bernie Jones, alias "Phylosipede" was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Correction Institution for and during the term and period of twenty-two (22) months beginning on the date on which he is received at the County Jail for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title 18, U. S. Code (Theft from an interstate shipment of freight).

CERTIFIED—132 days to serve.

6-25-37 E. A. ESTABROOK, *Record Clerk*

And Whereas, the Attorney General of the United States has designated the U. S. Industrial Reformatory at Chillicothe, Ohio as the place of confinement where the sentence of said Bennie Jones (alias Ben A. Jones,

alias Bernie Jones, alias "Phylosipede," shall be served;

Now, this is to command you, the said marshal, forthwith to take said Bennie Jones, alias Ben A. Jones, alias Bernie Jones alias "Phyosipede" and him safely transport to said Reformatory and him there deliver to said Superintendent of said Reformatory with a copy of this writ; and you, the said Superintendent, to receive said Bennie Jones, alias Ben A. Jones, alias Bernie Jones alias "Phylosipede" and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable W. I. Grubb, Judge of said Court, and the seal thereof, affixed at Birmingham, Alabama, in said district, this 25th day of May, 1934.

W. S. LOVELL, *Clerk.*

Mary L. Tortorici, *Deputy Clerk*

(L. S.)

A TRUE COPY:

W. S. LOVELL,

Clerk U. S. District Court

Northern District of Alabama.

By Mary L. Tortorici, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following, to wit: On May 25, 1934 I delivered said Bennie

Jones to the Warden of the Jefferson Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on June 8, 1934, I delivered said Bennie Jones to the Superintendent of U. S. Industrial Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

THOS. J. KENNAMER, *United States Marshal.*

By N. B. Aaron, *Deputy.*

EXHIBIT "B"—CONDUCT RECORD

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA

Record of BENNIE JONES Color Black No. 48111-A Alias Bernie Jones Crime Vio. Interstate Commerce Act Sentence 18 months Fine None Cost None Not Committed Received Apr. 11, 1936 Where convicted N-Ala: Huntsville. Sentenced Apr. 9, 1936 Occupation Janitor Age 19 Sentence commences Apr. 9, 1936 Full term expires Oct. 8, 1937 Good time allowance 108 days. Short term expires June 22, 1937 Residence Huntsville, Ala: Action of Parole Board Sept. 16, 1936; Did not file. WANTED (a) The Par. board instructed on 5-28-36 that after exp. inst. sent, subject, as a Cond. Rel. Vio. under Reg. No. 9616-C, is to be held in custody under warrant issued 3-17-36; return to be entered on warrant and same forwarded to Par. Board; revocation to be had at first meeting of board, after exp. of instant sentence.

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

For Retaking Prisoners Released under Authority

Pub. 210, 72d Congress

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal Process Within the United States:

Whereas, Bennie Jones, No. 2550-Lee was sentenced by the United States District Court for the Northern District of Alabama to serve a sentence of twenty-two months, for the crime of Theft of Interstate Shipment and was on the 13th day of November, 1935, released conditionally from the Federal Reformatory Camp, Petersburg, Virginia.

And, Whereas, satisfactory evidence has been presented to the undersigned Member of this Board that said prisoner named in this warrant has violated the conditions of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Bennie Jones, wherever found in the United States, and him safely

return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this
17th day of March, 1936.

ARTHUR D. WOOD,

Chairman, U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

U. S. Penitentiary,

Atlanta, Ga.

June 23, 1937

The within named Bennie Jones on June 22, 1937, completed the sentence of 18 months imposed 4-9-36, and is being held in custody as a conditional release violator to complete the within named sentence of 22 months, under which he was released conditionally 11-13-35.

B. F. B. Record Clerk.

**EXHIBIT "A"—COMMITMENT
IN THE
DISTRICT COURT OF THE UNITED
STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

The President of the United States of America—

To the Marshal of the United States for the NORTH-ERN District of ALABAMA and to the Warden of the United States Penitentiary at Atlanta, Georgia.

GREETING:

Whereas, at the April term of said Court, 1936, held at Huntsville, Ala., in said district and division, to wit, on April 9th, 1936, BENNIE JONES, alias Ben A. Jones, Bernie Jones, Phyllosipede, was sentenced by said Court, upon his conviction by a jury to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for and during the term and period of eighteen (18) months beginning on the date on which he is received at the (Penitentiary) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title

18, USC. (Did enter a railroad car containing an interstate shipment of freight from Huntsville, Ala., to Pinckneyville, Ill., with intent to commit larceny therein).

(Defendant convicted on Count No. 1 of the Indictment).

And, Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said BENNIE JONES, with aliases shall be served;

Now, this is to command you, the said Marshal, forthwith to take said BENNIE JONES, with aliases and safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said warden, to receive said BENNIE JONES, with aliases and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable David J. Davis, Judge of said Court, and the seal thereof, affixed at Huntsville, Alabama, in said district, this 9th day April, 1936.

W. S. LOVELL, *Clerk*
James L. Pugh, *Deputy Clerk*.

A TRUE COPY:

W. S. LOVELL, *Clerk*
U. S. District Court Northern District of Ala.
By James L. Pugh, *Deputy Clerk*.

RETURN

I have executed the within writ in the manner following, to wit: On April 9th, 1936 I delivered said Bennie Jones, with aliases to the Warden of the Madison County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on Apr. 11, 1936, I delivered said Bennie Jones, with aliases to the Warden of U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

ALEX SMITH, *United States Marshal*
By J. H. Garth, *Deputy*.

(TITLE OMITTED).

ORDER SUSTAINING WRIT OF HABEAS CORPUS AND DISCHARGING PETITIONER FROM CUSTODY

The above case came on for hearing, and was duly heard and considered.

The record shows petitioner was sentenced by the U. S. District Court for the Northern District of Alabama on the 5th day of May, 1934, to a term of twenty-two months. This term was served, with the exception of 132 days good time allowed, and petitioner was discharged upon conditional release. Subsequently, on the 9th day of April, 1936, he was sentenced by the same court to a term of eighteen months, nothing having been said about whether the sentence should run concurrently or consecutively with the prior sentence. The

two sentences would therefore run concurrently upon the return of petitioner to the custody of the United States. The parole warrant was issued on March 17, 1936. The Parole Board, on May 28, 1936, instructed the Warden to hold the warrant then sent as a detainer against petitioner.

In my opinion, the above facts show that petitioner came into the custody of the United States under both sentences at least as early as May 28, 1936, and that the sentences thereafter ran concurrently.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192 *Habeas Corpus*, decided on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst*, and upon authority of same;

IT IS CONSIDERED, ORDERED and ADJUDGED that the *writ of habeas corpus* be and hereby is sustained, and that respondent discharges petitioner from custody forthwith.

This 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29th, 1937.

(TITLE OMITTED.)

PETITION FOR APPROVAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause, on the 29th day of June, 1937, wherein the *writ of habeas corpus* was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America,

and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney

H. T. NICHOLS,
Assistant United States Attorney
Counsel for Respondent

Filed June 29, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00 without sureties.

Dated this 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29, 1937.

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits thereto attached, and said pleadings are hereby settled as the evidence in said case.

This 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29, 1937.

(TITLE OMITTED.)

ASSIGNMENTS OF ERROR

And now on the 29th day of June, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 29th day of June, 1937, is erroneous:

(1) Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2) Because the court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3) Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4) Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5) Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6) Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7) Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining

the writ of *habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said *writ or habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

Filed June 29, 1937.

(TITLE OMITTED.)

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said

Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for *habeas corpus* with exhibits attached thereto and order allowing the same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of Court of June 29th, 1937.

4. Petition for appeal and order of Court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed June 29, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,)
NORTHERN DISTRICT OF GEORGIA.)ss:

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 25 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

F. G. ZERBST, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, RE-
SPONDENT, *Appellant*,

versus

BENNIE JONES, PETITIONER, *Appellee*,

as specified in the præcipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia; except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I here-
unto subscribe my name and affix the

seal of the said District Court, at Atlanta,
Georgia, this the 3rd day of July, A. D.,
1937.

(SEAL) J. D. STEWARD,
*Clerk, United States District Court,
Northern District of Georgia,*

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record,
the original thereof being on file in the office of the
Clerk of the United States Circuit Court of Appeals.

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PAGE

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

BENNIE JONES

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the
Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants

for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920 the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escue vs. Zerbst*, 295 U. S. 490.

Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as

the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

BENNIE JONES

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 28 to 40 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8516, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Behnie Jones is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 27 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 788

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

HENRY STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8527

F. G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA,
RESPONDENT,

Appellant,

versus

HENRY STONE, PETI-
TIONER,

Appellee.

No. 1238

**HABEAS
CORPUS**

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.

United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,

Assistant United States Attorney, Atlanta, Ga.,

H. T. NICHOLS, ESQ.,

*Assistant United States Attorney, Atlanta, Ga.,
Council for Respondent*

CLINT W. HAGER, ESQ.,

*621 Atlanta National Bank Bldg., Atlanta, Ga.
Attorney for Appellee.*

**IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**HENRY STONE,
PETITIONER,**

versus

No. 1238

**F. G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA,
RESPONDENT.**

**HABEAS
CORPUS**

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your Petitioner, Henry Stone, and respectfully states, avers, and shows this Honorable Court that he is now illegally imprisoned and restrained of his liberty in the U. S. Penitentiary at Atlanta, Ga., and within the jurisdiction of this Honorable Court, by F. G. Zerbst, Warden of the said Penitentiary. The color of authority by virtue of which the said F. G. Zerbst, Warden of the said Penitentiary restrains and imprisons your Petitioner is a warrant of commitment issued by the United States District Court for the Middle District of Georgia, on the 23rd day of July, 1936, at Athens, a certified copy of which said warrant of commitment is hereto attached and marked as "Exhibit A", by which reference the said copy is made part of the records herein.

The said warrant of commitment was issued by the

said court pursuant to a judgment order, and sentence rendered and imposed after a plea of guilty had been entered by Petitioner to an indictment in the said court, a certified copy of which said judgment order and sentence and indictment are hereto attached and marked as exhibit "B" and "C", by which references the said copies of the said documents are made part of the records herein. Your Petitioner now states, and shows this Honorable Court that said F. G. Zerbst, Warden of said Penitentiary, is now wholly without any authority in law to further restrain and imprison your Petitioner for the following reasons, to wit:

1st. Your Petitioner has now fully served his sentence with deductions allowed him by law for good behavior, and has now fully complied with all the laws governing his case.

2nd. Petitioner having fully and lawfully served his sentence, the Warden of the United States Penitentiary, at Atlanta, Ga., is now wholly without lawful authority to further detain and restrain your Petitioner, and therefore his further imprisonment is in violation of the Constitution of the United States and is without due process of law. .

STATEMENT OF FACTS

Petitioner entered a Plea of guilty to an indictment in the United States District Court for the Middle District of Georgia, at Athens, on the 23rd day of July 1936, and was then and thereupon sentenced by the Court to imprisonment in a Penitentiary for a period of 1 year, 1 day, (see exhibit "B"). The United States Attorney then called the court's attention to the facts

that Petitioner had theretofore been sentenced to the United States Penitentiary, at Chillicothe, Ohio, and that he had been paroled therefrom, and that he had not fully served his Parole Period, and was then wanted by the Warden of the said Penitentiary for Parole Violation. The Court then stated that Petitioner was up for sentence on an indictment charging a violation of the Internal Revenue Law, and that the Court could not enter into the merits and demerits of the Parole and its alleged violation. The Court then decided that the sentence of 1 year, 1 day, begins on that, the 23rd day of July 1936. Petitioner was duly delivered to the custody of the Warden of the United States Penitentiary, Atlanta, Ga., where he has since been confined. Petitioner now having fully served his sentence of 1 yr. 1 day with deductions allowed him by law for good behavior, as well as the 6 months which he had not served on his former sentence when he was released on Parole, the Warden refusing to release your Petitioner, he now prays this Honorable Court for the writ of *Habeas Corpus*.

Wherefore: Your Petitioner respectfully prays this Honorable Court that a *writ of Habeas Corpus* issue directed to the Warden of the United States Penitentiary, Atlanta, Ga., to bring and have your petitioner before this Court at a time to be determined by this Court, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts in this regard, and the legality of your Petitioners imprisonment as the law and justice may require.

HENRY STONE, PETITIONER, No. 48901.

AFFIDAVIT

Personally appeared before me Henry Stone who being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein contained are true, except as to such matters as are stated upon information and belief, and these he verily believes are true and that he believes he is entitled to the redress sought therein.

Sworn to and subscribed before me this 2d day of July, 1937.

ERNEST D. ETHERIDGE.

Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen and imprisoned and detained in the United States Penitentiary, Atlanta, Ga., and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he is entitled to the redress sought therein, wherefore: Your Petitioner prays this Honorable Court to grant him permission to file and prosecute the said action without cost.

HENRY STONE, *Petitioner.*

Sworn to and subscribed before me this 2d day of July, 1937.

ERNEST D. ETHERIDGE,
Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

ORDER GRANTING WRIT

Read and considered. Let the writ issue as prayed, in *forma pauperis*, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 10th day of July, 1937.

This the 9th day of July, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 9th, 1937.

NOTE: Exhibit "A", omitted, same appears as Exhibit "C", attached to answer on page 13.

EXHIBIT "C"—INDICTMENT

**INDICTMENT FOR UNLAWFUL DISTILL-
ING, ETC.**

UNITED STATES OF AMERICA, ALBANY DI-
VISION, MIDDLE DISTRICT OF GEORGIA,
UNITED STATES DISTRICT COURT,
APRIL TERM, 1936

The Grand Jurors of the United States, selected,
chosen and sworn in and for the Middle District of
Georgia, upon their oaths present:

COUNT ONE

That on or about the 2nd day of March, A. D. 1936,
in the Athens Division of the Middle District of Geor-
gia, and within the jurisdiction of the said Court, in
the County of Franklin, one Henry Stone; one Howard
Fulbright and one Dempsey Thomas, whose further
given name is to the Grand Jurors unknown, did un-
lawfully, willfully and knowingly have in his posses-
sion and custody and under his control a still and dis-
tilling apparatus for the production of spirituous
liquors, set up without having the same registered as
required by law; contrary to the form of the statute in
such case made and provided, and against the peace and
dignity of the United States (26 U. S. C. A. 281;
R. S. 3258.)

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas did unlawfully, willfully and knowingly carry on the business of a distiller of spirituous liquors, without having given bond as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (26 U. S. C. A. 306; R. S. 3281.)

COUNT THREE

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas did unlawfully, willfully and knowingly engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of the tax of the spirits distilled by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (26 U. S. C. A. 306, R. S. 3281.)

COUNT FOUR

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas unlawfully, willfully and knowingly did work in a distillery for the production of spirituous liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept, as required by law; contrary to the form of the statute in such case made and provided,

and against the peace and dignity of the United States,
(26 U. S. C. A. 303-304; R. S. 3279.)

LAMAR C. McELVEY,
Foreman of the Grand Jury.

JOHN P. COWART,
Assistant United States Attorney.

BACK OF INDICTMENT

No. 960 UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA ALBANY DI-
VISION THE UNITED STATES OF AMERICA
VS HENRY STONE: HOWARD FULBRIGHT:
DEMPSEY THOMAS. INDICTMENT Violation:
Internal Revenue Laws (Liquor) A True Bill Lamar
C. McElvey, Foreman. Filed in open court this April
7th, 1936. GEORGE F. WHITE, CLERK.

PLEA

The defendants Henry Stone; Howard Fulbright and
Dempsey Thomas waives arraignment and pleads guilty
in open court this 20th day of July, 1936.

HENRY STONE

HOWARD FULBRIGHT

DEMPSEY THOMAS.

EXHIBIT "B"

**DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

INDICTMENT NO. 960

SENTENCE

Whereupon it is considered, ordered and adjudged by the Court that the defendant Henry Stone now present in Court, be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for the term and period of One Year and One Day and to stand committed until he shall be otherwise discharged by law.

The defendant shall also pay a fine to the United States in the sum of Three Hundred Dollars, and if such a fine is not paid same shall be collected by execution.

In open Court this the 23rd day of July, 1936.

BASCOM S. DEEVER,
United States Judge

RETURN

Now comes the respondent in the above-entitled proceeding, and, in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Middle District of Georgia, a copy of which, marked "Exhibit A", is hereto attached and made a part of this return. Also attached hereto and made a part hereof is a copy, marked "Exhibit B," of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary, showing respondent's computation of petitioner's period of servitude. Respondent further says that the facts are as follows:

Respondent holds in his possession two warrants of commitment for the incarceration of petitioner, both having been issued by the U. S. District Court for the Middle District of Georgia, and each directing imprisonment for a term of one year and one day. Petitioner was first committed to the U. S. Industrial Reformatory at Chillicothe, Ohio, under the mittimus referred to above as "Exhibit A." While serving this sentence he was on Dec. 3, 1935, released on parole. On July 23, 1936, he was returned to the Atlanta institution with a new sentence of one year and one day as evidenced by warrant of commitment, copy of which, marked "Ex-

hibit C," is annexed hereto and by reference incorporated in this return.

Petitioner was declared a parole violator, and warrant of the Parole Board issued for his retaking, dated June 3, 1936, a copy of which, marked "Exhibit D," is hereto annexed, and by reference made a part of this return. In letter dated August 24, 1936, addressed to the Warden of the Atlanta Federal Prison, signed by Ray L. Huff, Parole Executive, transmitting this warrant, respondent was directed that the warrant be placed as a detainer, and that petitioner be taken into custody on it at the expiration of the second sentence. The letter further instructed that the case should be listed for hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with.

On May 12, 1937, the second sentence of one year and one day expired, and petitioner was served with the aforesaid parole warrant, and is now held under it to await the action of the next meeting of the Board of Parole.

If the two sentences of petitioner are to be computed as running concurrently, Respondent admits that his term of servitude would expire on May 12, 1937.

While it is admitted that both warrants of commitment are silent as to sequence of service, and that no directions are contained in either mittimus as to concurrent or consecutive service, respondent asserts on the other hand that the parole warrant having been executed, and the Parole Board having never revoked petitioner's parole, and the parole warrant having been

retained throughout this period as a detainer, the unexpired portion of the petitioner's first sentence still remains unsatisfied, and the Parole Board is not without jurisdiction to restrain petitioner under the aforesaid parole warrant, and to revoke his parole or take such other action as it sees fit.

Wherefore, having fully answered, respondent prays the judgment of the Court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Asst. U. S. Attorney.

H. T. NICHOLS,
Asst. U. S. Attorney.

Counsel for Respondent.

COMMITMENT

EXHIBIT "A"

CRIMINAL NUMBER 870

**IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

The President of the United States of America—

To the Marshal of the United States for the Middle

District of Georgia and to the Warden of the U. S. Industrial Reformatory at Chillicothe, Ohio, GREETING:

Whereas, at the June term of said Court, 1935, held at Athens, Georgia, in said district and division, to wit, on June 3rd, 1935, Henry Stone was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Correctional Institution for and during the term and period of One Year and One Day beginning on the date on which he is received at the U. S. Industrial Reformatory (Correctional Institution) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; and to pay a fine to the United States in the sum of \$300.00 this fine to be collected by execution, and to stand committed until he shall be otherwise discharged by due course of law, for his violation of 26 U. S. C. A. 281-306-303-304. Unlawful possession of still and apparatus set up without having same registered; carrying on business of a distillery without giving bond; carrying on business of distiller with intent to defraud U. S. of tax; working in a distillery upon which no sign bearing words "Registered Distillery" was placed and kept.

And Whereas, the Attorney General of the United States has designated the U. S. Industrial Reformatory at Chillicothe, Ohio, as the place of confinement where the sentence of said Henry Stone shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Henry Stone and him safely transport to said U. S. Industrial Reformatory and him there deliver to said Warden of said U. S. Industrial Reformatory with a copy of this writ; and you, the said Warden, to receive said Henry Stone and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable Bascom S. Deaver, Judge of said Court, and the seal thereof, affixed at Athens, Ga., in said district, this 3rd day of June, 1935.

GEORGE F. WHITE, *Clerk.*

Vane G. Hawkins, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following, to wit: On June 3, 1935 I delivered said Henry Stone to the Jailer of the Clarke Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on June 7, 1935, I delivered said Henry Stone to the Warden of U. S. Ind. Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

E. B. DOYLE, *United States Marshal.*

By C. A. Ginn, *Deputy.*

183 days remains to be served on this Writ.

JOHN H. CLARK, *Record Clerk.*

May 6, 1937.

EXHIBIT "B"—CONDUCT RECORD

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA

Record of Henry Stone, Color, White, No. 48901, Crime, Illicit Distilling, etc. Sentence 2 years 2 days. Fine, \$600.00; Cost, none. Not Committed. Received July 23, 1936. Where convicted, M-Ga-Athens. Sentenced 6-3-35, 7-23-36. Occupation, Laborer. Age 28. Sentence commences 6-3-35, 7-23-36. Full term expires Nov. 11, 1937. Residence, Lavonia, Ga. Action of Parole Board, 12-10-36—Did not file.

Subject completed the sentence imposed July 23, 1936, on May 12, 1937, and is being held in custody as a parole violator from USIR, Chillicothe, O., under sentence of 1 year and 1 day, imposed June 3, 1935, under which he was paroled from the Chillicothe Institution on June 3, 1936.

VIOLATIONS

- 6-3-35 sentenced to 1 year and 1 day.
- 6-7-35 received at USIR, Chillicothe, O.
- 12-3-35 paroled from USIR, Chillicothe, O.
- 6-3-36 declared parole violator.
- 7-23-36 Sentenced to 1 year and 1 day.
- 7-23-36 received at USP, Atlanta, Ga., as No. 48901.
- 5-12-37 sentence expired as No. 48901.
- 5-13-37 in custody to serve remainder of 1st sentence—has 183 days to serve if parole revoked.

Filed July 10th, 1937.

COMMITMENT

EXHIBIT "C"

CRIMINAL NUMBER 960

**IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

The President of the United States of America—

To the Marshal of the United States for the Middle District of Georgia and to the Warden of the U. S. Penitentiary at Atlanta, Georgia, GREETING:

Whereas, at the June Term of said Court, 1936, held at Athens, Georgia, in said district and division, to wit, on July 23, 1936, Henry Stone was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of One Year and One Day beginning on the date on which he is received at the U. S. Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; and to pay a fine to the United States in the sum of \$300.00, this fine to be collected by execution, and to stand committed until he shall be otherwise discharged

by due course of law, for his violation of Internal Revenue Laws (Liquor) unlawful possession of still and apparatus set up without having same registered; carrying on business of distillery without giving bond; carrying on business of distiller with intent to defraud U. S. of Tax; working in a distillery upon which no sign bearing words "Registered Distillery" was placed and kept.

And Whereas, the Attorney General of the United States has designated the U. S. Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said Henry Stone shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Henry Stone and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said U. S. Penitentiary with a copy of this writ; and you, the said Warden, to receive said Henry Stone and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable Bascom S. Deaver, Judge of said Court, and the seal thereof, affixed at Athens, Georgia, in said district, this 23rd day of July, 1936.

GEORGE F. WHITE, *Clerk*.

Vane G. Hawkins, *Deputy Clerk*.

RETURN

I have executed the within writ in the manner following, to wit: On July 23, 1936 I took into custody Henry Stone temporarily pending transfer to the institution herein designated for the service of sentence, and on July 23, 1936, I delivered said Henry Stone to the Warden of U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

E. B. DOYLE, *United States Marshal.*

By R. O. Doyle, *Deputy.*

EXHIBIT "D"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

*To Any Federal Officer Authorized to Serve Criminal
Process Within the United States:*

Whereas, Henry Stone, Reg. No. 10984-C, was sentenced by the United States District Court for the Middle District of Georgia to serve a sentence of one year and one day for the crime of violation Internal Revenue Act and was on the third day of December, 1935, released on parole from the United States Industrial Reformatory, Chillicothe, Ohio,

AND, WHEREAS, satisfactory evidence having

been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice.

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Henry Stone, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this third day of June, 1936.

ARTHUR D. WOOD,
Chairman, U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

U. S. Penitentiary,
Atlanta, Ga.,
May 13, 1937.

The within named Henry Stone No. 48901 completed on the 12th inst., a sentence of 1 year and 1 day imposed July 23, 1936 and was held in custody from this date as a parole violator under the within mentioned warrant.

FRED G. ZERBST,
Warden.

By B. F. Bates, *Record Clerk.*

**ORDER SUSTAINING WRIT OF HABEAS
CORPUS AND DISCHARGING
PETITIONER**

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell vs. Zerbst*, No. 1192 *Habeas Corpus*, decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell vs. Zerbst*, and upon authority of same;

IT IS CONSIDERED, ORDERED AND ADJUDGED that the writ of *habeas corpus* be and hereby is sustained, and that respondent discharge petitioner from custody forthwith.

This 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

Filed July 10, 1937.

File

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDER-
WOOD, JUDGE OF SAID COURT:

The above named appellant, F. G. Zerbst, as Warden of The United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 10th day of July, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,

United States Attorney

HARVEY H. TYSINGER,

Assistant United States Attorney

H. T. NICHOLS,

Assistant United States Attorney

Counsel for Respondent.

Filed July 10, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00 without sureties.

Dated this 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits there referred to, and said pleadings and exhibits are hereby settled as the evidence in said case.

This 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge

Filed July 10, 1937.

ASSIGNMENT OF ERRORS

And now on the 10th day of July, 1937, comes the appellant by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Asst. U. S. Attorney and H. T. Nichols, Asst. U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 10th day of July, 1937, is erroneous:

(1) Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2) Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3) Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4) Because the court erred in ruling that the familiar rule of concurrence of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5) Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

(6) Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7) Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining the writ of *habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of *habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney
H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

Filed July 10, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE- ENTITLED COURT

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. The original petition for *habeas corpus* with exhibits attached thereto and order allowing the same.
2. The return of the respondent with exhibits attached thereto.
3. The judgment and order of Court of July 10, 1937.
4. Petition for appeal and order of Court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit as required by law and the rules of
said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed July 10, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 22 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of F. G. ZERBST, WARDEN U. S. PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, appellant, versus HENRY STONE, PETITIONER, appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledge-

ment of service thereon is included herein in the stead of a copy thereof.

In Testimony whereof I hereunto subscribe my name and affix the seal of the said District Court at Atlanta, Georgia, this the 14th day of July, A. D., 1937.

J. D. STEWARD,
*Clerk, United States District Court,
Northern District of Georgia,*

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

HENRY STONE

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

. FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the
Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts com-

mon to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct, and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. §753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910, (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A., § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally

imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law as amended by the Act of May 13, 1930, (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A., 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect, and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

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"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mitimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escove vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole

and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A., § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

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Judgment

Extract from the Minutes of November 10, 1937

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

HENRY STONE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 29 to 41 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8527, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Henry Stone is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 28 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. And it is ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as filed in response to such writ.

Justice REED took no part in the consideration or decision of the application.

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CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

VS.

JEFFIE D. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8555

FRED G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA,
RESPONDENT.

Appellant

versus

JEFFIE D. SULLIVAN, PE-
TITIONER,

Appellee

No. 1253
HABEAS
CORPUS

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.

United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,

Asst. United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,

Asst. United States Attorney, Atlanta, Ga.

Counsel for Appellant

JEFFIE D. SULLIVAN,

204 Winston Street, Huntsville, Alabama.

In Propria Persona.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF GEORGIA, ATLANTA DIVISION

JEFFIE D. SULLIVAN,
Petitioner,

vs.

FRED G. ZERBST, Warden,
U. S. Penitentiary, Atlanta,
Georgia,

Respondent.

No. 1253

HABEAS
CORPUS

PETITION

Now comes Jeffie D. Sullivan and respectfully shows to this Honorable Court that he is a citizen of the United States and is now unlawfully held and restrained of his liberty by Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Ga., within the jurisdiction of this Honorable Court.

1

That in May, 1934, your petitioner pleaded guilty in the United States District Court for the Northern District of Alabama, and was sentenced to be imprisoned for twenty-two months. Your petitioner actually served 17 months and 18 days, and was given a conditional release, and discharged from the penitentiary as if on parole, for the full term of his sentence.

2

That on the 9th day of April, 1936, your petitioner

1.

was again sentenced in the same Court to serve a term of 18 months in a penitentiary. Your petitioner was duly committed to the Atlanta Penitentiary pursuant to said sentence and has now executed the same in full. Petitioner respectfully shows that this latter sentence was silent as to sequence of service, and contained no provision whatever that it was to run either consecutively or concurrently with any other sentence. Petitioner avers that by operation of law said two sentences should be construed as running concurrently.

3

Petitioner further respectfully shows to the Court that during his incarceration under said second sentence the parole warrant which issued for violation of his conditional release was never executed, but was held in abeyance until after petitioner had served in full his said second sentence. Upon completion of this sentence the parole warrant was exhibited to your petitioner and petitioner was informed by the officials of the Atlanta Penitentiary that he was being held to perform the unexpired balance of the first sentence on which he was paroled.

4

Petitioner respectfully shows that when he was released on parole or conditional release there remained approximately four months and twelve days of unserved time under this sentence, and that on the latter sentence of 18 months petitioner has served, with deduction for good time, 13 months and 22 days. Petitioner shows to the Court that if the two sentences be computed as running concurrently, his time is now up, and in fact

he would have been eligible for discharge from custody on June 23rd, 1937. Therefore there is no question of prematurity involved in this petition for habeas corpus.

WHEREFORE, your petitioner prays that he be released from unlawful custody and that this Honorable Court issue its writ of habeas corpus directing the respondent herein to produce the body of your petitioner before this Honorable Court, at a time and place to be specified therein, and that respondent be required to show cause, if any he has, why your petitioner should not be released.

JEFFIE D. SULLIVAN,
Petitioner.

GEORGIA,
FULTON COUNTY:

AFFIDAVIT

Personally appeared before me the undersigned attesting officer, Jeffie D. Sullivan, who after being duly sworn deposes and says that he has read the foregoing petition, that he knows the contents thereof, and that the allegations therein contained are true to the best of his knowledge and belief, and that he believes he is entitled to the redress sought therein.

JEFFIE D. SULLIVAN.

SUBSCRIBED AND SWORN TO BEFORE ME
THIS THE 20 DAY OF JULY, 1937.

M. O. HOLLIS,
Notary Public, State at Large, Atlanta, Ga.
(Notary Seal)

AFFIDAVIT IN FORMA PAUPERIS

**GEORGIA,
FULTON COUNTY:**

Petitioner being duly sworn deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Ga., and within the jurisdiction of this Honorable Court, that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention, but that because of his poverty he is unable to pay the costs of the said action, or to give security for same and that he believes he is entitled to the redress he seeks therein.

Wherefore petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without costs.

JEFFIE D. SULLIVAN.

**SWORN TO AND SUBSCRIBED BEFORE ME
THIS THE 20TH DAY OF JULY, 1937.**

M. O. HOLLIS,

*Notary Public State at Large, Atlanta, Ga.
(Notary Seal)*

ORDER GRANTING WRIT IN FORMA PAUPERIS

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta,

Georgia, at 10:00 o'clock a. m. on the 31st day of July, 1937.

This the 30th day of July, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 30, 1937.

ANSWER

Now comes the respondent in the above entitled proceeding and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Northern District of Alabama. Also attached hereto and by reference incorporated herein is a copy marked "Exhibit A" of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary showing respondent's computation of petitioner's period of servitude.

Further answering, the respondent says that petitioner was originally committed to the United States Industrial Reformatory at Chillicothe, Ohio, pursuant to a sentence of 22 months. This term was executed in full less deduction for good time, and petitioner was given a confidential release in accordance with the provisions of Section 716b, Title 18, U. S. Code. After-

ward he was returned to the Atlanta Federal Penitentiary with a new sentence of 18 months, which was also imposed by the United States District Court for the Northern District of Alabama. A copy of the warrant of commitment of this case is also attached hereto, marked "Exhibit B" and is by reference made a part of this return. This sentence began on April 9, 1936, and with deduction for good time expired on June 22, 1937. At the time of recommitment under the second sentence, there remained unserved on the first sentence 132 days, representing conditional release time. If the two terms of the petitioner be computed as running concurrently, then both sentences would have expired on June 22, 1937, and it must be admitted that the writ of habeas corpus is not premature.

On March 17, 1936, a parole warrant was issued for petitioner's arrest for violation of his conditional release, a copy of which is attached hereto, marked "Exhibit C" and is by reference incorporated in this return. This warrant was never served or executed upon petitioner until after satisfaction of the said 18 months sentence, but was kept in the files of the respondent as a detainer, or, we might say, it was lodged at the prison as a detainer. In letter dated May 28, 1936, respondent was instructed by the United States Board of Parole that after expiration of the 18 months sentence, petitioner was to be held as a conditional release violator under the aforesaid conditional release violator warrant; that return was to be entered on the warrant and the same forwarded to the Parole Board and revocation was to be had at the first meeting of the Board after expiration of said 18 months sentence.

Respondent further says that the instructions of the

Parole Board were strictly complied with and the warrant was retained in the files as a detainer and not served upon petitioner during the running of said 18 months sentence, but when same was completed the said parole warrant was served upon petitioner, he was taken into custody under it, or, we might say, his custody was continued under the said parole warrant and he was held to await a hearing before the United States Board of Parole when it should next convene at the United States Penitentiary in Atlanta. The hearing was had on June 29, 1937, and as is the usual practice, it was had before one member of the Board. The evidence was taken and the entire case was continued to a meeting of the full board in Washington, D. C., with a recommendation of the parole member that the conditional release or parole of petitioner be revoked.

It will be noted from the return of the parole warrant attached hereto, marked "Exhibit C," that on June 22, 1937, petitioner completed the second sentence of 18 months and is now being held in custody as a conditional release violator to back-up or execute the unserved portion of the said 22 months sentence as stated which amounts to 132 days of conditional release time.

It is not suggested that there were any directions in either sentence as to whether the service should be consecutive or concurrent, but both sentences were silent on this point. Respondent merely contends that the jurisdiction of the Parole Board has not been exhausted and that its power to revoke petitioner's parole or conditional release is not ousted by reason of the fact that the 18 months sentence supervened before it had

heard petitioner's case on the question of revocation of conditional release time.

WHEREFORE, having fully answered, respondent prays the judgment of the Court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney,

H. T. NICHOLS,
*Assistant United States Attorney,
Counsel for Respondent.*

Filed July 31, 1937.

EXHIBIT "A"

**CONDUCT RECORD
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA**

Record of Jeffie D. Sullivan, Color Black, No. 48112
Alias Debo Sullivan; Bill May Sullivan; Crime Vio.
Interstate Commerce Act, Sentence 40 months. Fine
None. Cost None. Not Committed. Received Apr.
11, 1936. Where convicted N-Ala-Huntsville. Sentenced
5-25-34, Apr. 9, 1934. Occupation Laborer. Age 19. Sen-
tence commences Apr. 9, 1936. Full Term expires Nov.
1, 1937. (If CR Revoked) Residence, Huntsville, Ala.
Action of Parole Board, Sept. 16, 1936 — DENIED.

June 29, 1937—Rec revoke. Previous Criminal Record Admits; 1933 PD, Huntsville, Ala.; same name, P. L. Dismissed. 1934 USIR, Chillicothe, O., same name, No. 9617; Vio. Int. Com. Act. 22 mos. disch. by (a) cond. rel. Nov. 13, 1935. COND. REL. VIOLATOR WANTED? (a) WANTED: The Par. Board instructed on 5-28-36 that after expiration of inst. sent., subject, as cond. rel. vio. under Reg. No. 9617-C, is to be held in custody under cond. rel. violator warrant issued Mar. 17, 1936; return to be entered on warrant and same forwarded to Par. Board: revocation to be had at first meeting of Board, after exp. inst. sentence.

VIOLATIONS

DATE 1936

AUG 2—FIGHTING IN DINING HALL

The above named prisoner was fighting with No. 47568 this morning while setting up Dining Hall for late mess. After moving them from Dining Hall they still insisted on keeping it up.—Junior Officer, John Kersey.

ACTION: Isolation on restricted diet. Reduced to 2nd Grade.

In Isol—8-2-36—10:30 A. M.

Rel Isol—8-11-36—12:15 P. M.

9 Days 1¾ Hours (3 Full Meals)

SEPT. 1 RESTORED TO FIRST GRADE

DEC. 1 STEALING FOOD.

The above prisoner stole a bowl of peaches when

they were being put out at Mess Sunday, Nov. 29th.—
Guard—John Finn.

ACTION: Reprimanded and warned. Yard and amusement privileges taken for two weeks.

1-26-37 LOAFING ON THE JOB:

The above named prisoner was loafing out in the Wash Room during scrubbing time in the Dining Room, and would not do his share of the work assigned to him.—Guard: John Finn.

ACTION: Placed in Solitary Confinement and reduced to Second Grade.

In Isol—1-26-37—2:00 P. M.

Rel Isol—2-1-37-12:15 P. M. 5 Days 22 hrs. (2 Full Meals).

Feb. 25-37—RESTORED TO FIRST GRADE.

Mar. 27, 1937.

DISOBEDIENCE & INSOLENCIE.

This man would not move out of a bath stall reserved for whites and when I asked for his number he refused that to me. I had to get the number off his clothing. Guard: Chas. B. McCall.

ACTION: Solitary Isolation: reduced to second grade.

In Isol—3-27—2:00 P. M.

Rel Isol—4-3-12:15 P. M. 6 Days 1 ¾ hrs (Two full meals).

Mar. 27, 1937.

DISOBEDIENCE & INSOLENCES.

This man refused to move to colored section in bath room also refused to tell me his number, said look at his clothes for number. GUARD: W. H. Lyon.

Action taken on similar case of even date.

April 1-37—INSOLENCE;

Upon my immediate entry on duty the above prisoner demanded that I turn the light off in his cell. I explained that they would be turned off at 10:00 P. M. while making my rounds just before 10:00 P. M. Sullivan jumped up before the cell door in an indignant and insolent manner shouted "You turn off that light." —E. W. Yates, Jr., Custodial Officer.

ACTION—To remain in solitary isolation and continue in second grade to May 1, 1937—

MAY 1, 1937—RESTORED TO FIRST GRADE.

June 21, 1937—POSS. OF CONTRABAND? MUTILATING GVT. PROPERTY. INSOLENCES

Sullivan claimed possession of six portions of roast beef which he hid under the table top. A table spoon was mutilated by him to form a clamp to hold the bowl in place after asking him two or three questions his manner became very insolent.—Guard—E. A. Brown, Jr. Ofer.

ACTION — Solitary Isolation reduced to second grade.

(1 full meal) In Isol. 6-21-2 P. M. Rel. Isol—6-27-12:30 P. M. 5 Days 22 1-2 hrs.

5-25-34: Sentenced to 22-mos. 6-8-34: Rec'd. at USIR. 11-13-35: Released Condly. from there.

3-17-36: Declared CR Vio., has 132 Days to serve, if CR Revoked.

4-9-36: Sentenced to 18 mos.

4-11-36: Rec'd here as No. 48112. 6-22-37: Sentence expired as No. 48112.

6-23-37: In custody as Cond. Rel. Vio. from USIR, Chillicothe.

EXHIBIT "B"

**IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

To the President of United States of America:

To the Marshal of the United States for the Northern District of Alabama and to the Warden of the United States Penitentiary at Atlanta, Georgia,
GREETING:

Whereas, at the April term of said Court, 1936, held at Huntsville, Ala., in said district and division, to wit,

on April 9th, 1936, JEFFIE D. SULLIVAN, *aliases* Debo Sullivan, Bill May Sullivan, was sentenced by said Court, upon his conviction by a jury to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of eighteen (18) months beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title 18, USC. (Did enter a railroad car containing an interstate shipment of freight from Huntsville, Ala., to Pinckneyville, Ill., with intent to commit larceny therein).

(Defendant convicted on Count No. 1 of the Indictment)

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said JEFFIE D. SULLIVAN, *with aliases* shall be served.

Now, this is to command you, the said Marshal, forthwith to take said JEFFIE D. SULLIVAN, *with aliases* and him safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said JEFFIE D. SULLI-

VAN, *with aliases* and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

A TRUE COPY:

W. S. LOVELL, *Clerk,*
U. S. District Court, Northern District of Ala.

By James L. Pugh, *Deputy Clerk*

WITNESS the Honorable David J. Davis, Judge of said Court, and the seal thereof, affixed at Huntsville, Alabama, in said district, this 9th day of April, 1936.

W. S. LOVELL, *Clerk.*

James L. Pugh, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following to-wit: On April 9th, 1936, I delivered said Jeffie D. Sullivan, *with aliases* to the Warden of the Madison County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on April 11, 1936, I delivered said Jeffie D. Sullivan to the Warden of U. S. Penitentiary at Atlanta, Georgia, together with a copy of this commitment.

ALEX SMITH, *United States Marshal*

By J. H. Garth, *Deputy.*

I hereby certify that the within named federal pris-

oner was committed to the Madison County Jail, Huntsville, Alabama, and began serving sentence in this case on this the 9th day of April, 1936.

ALEX SMITH, *United States Marshal.*

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

FOR RETAKING PRISONERS RELEASED

UNDER AUTHORITY

PUB. 210, 72D CONGRESS

THE UNITED STATES BOARD OF PAROLE

*To any Federal Officer Authorized to Serve Criminal
Process Within the United States.*

WHEREAS, Jeffie D. Sullivan, No. 9617-C was sentenced by the United States District Court for the Northern District of Alabama to serve a sentence of twenty-two months, for the crime of Vio. Sec. 409 T 18 USC—Theft from Interstate Shipment of Freight and was on the 13th day of November, 1935, released conditionally from the U. S. Industrial Reformatory, Chillicothe, Ohio.

AND, WHEREAS, satisfactory evidence has been presented to the undersigned Member of this Board

that said prisoner named in this warrant has violated the conditions of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Jeffie D. Sullivan, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 17th day of March, 1936.

When apprehended communicate with Director, Bureau of Prisons for instructions.

ARTHUR D. WOOD,
Chairman, U. S. Board of Parole.

U. S. Penitentiary,
Atlanta, Ga.
June 23, 1937

The within named Jeffie D. Sullivan on June 22, 1937, completed a sentence of 18 months imposed 4-9-36, and is being held in custody as a conditional release violator to complete the within mentioned sentence of 22 months, under which he was released conditionally Nov. 13, 1935.

B. F. BATES, *Record Clerk.*

**ORDER SUSTAINING WRIT AND DIS-
CHARGING PETITIONER.**

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell vs. Zerbst*, No. 1192 *Habeas Corpus*, decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell vs. Zerbst*, and upon authority of same;

**IT IS CONSIDERED, ORDERED AND AD-
JUDGED** that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody forthwith.

This 31st day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

Filed July 31st, 1937.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named appellant, F. G. Zerbst, as Warden of The United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 31st day of July, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney.
HARVEY H. TYSINGER,
Asst. U. S. Attorney,
H. T. NICHOLS,
Asst. U. S. Attorney,
Counsel for Respondent.

Filed July 31, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee, shall be released on bail in the sum of \$100.00 without sureties.

Dated this 31st day of July, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed July 31, 1937.

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits there-to attached, and said pleadings are hereby settled as the evidence in said case.

This 31st day of July, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed July 31, 1937.

ASSIGNMENT OF ERRORS

And now on the 31st day of July, 1937, comes the appellant by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney, and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 31st day of July, 1937, is erroneous.

1. Because the Court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

2. Because the Court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

3. Because the Court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

4. Because the Court erred in ruling that the familiar rule of concurrence of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

5. Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

6. Because the Court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary; and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

7. Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the Court erred in sustaining the *writ of habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE, the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said *writ of habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP.
United States Attorney.
HARVEY H. TYSINGER,
Asst. U. S. Attorney.
H. T. NICHOLS,
Asst. U. S. Attorney.
Counsel for Respondent.

Filed July 31, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. The original petition for habeas corpus and order allowing same.
2. The return of the respondent with exhibits attached thereto.
3. The judgment and order of Court of July 31, 1937.
4. Petition for appeal and order of Court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Asst. U. S. Attorney.

H. T. NICHOLS,
Asst. U. S. Attorney.

Filed July 31, 1937:

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)

) ss: }

NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 18 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of -

FRED G. ZERBST, WARDEN, UNITED
STATES PENITENTIARY, ATLANTA,
GEORGIA, RESPONDENT,

Appellant,

versus

JEFFIE D. SULLIVAN, PETITIONER,

Appellee,

as specified in the praecipe of counsel herein and as

the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgment of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I
hereunto subscribe my name and
affix the seal of the said District
Court, at Atlanta, Georgia, this the
4th day of August, A. D., 1937.

(SEAL)

J. D. STEWARD,
*Clerk, United States District
Court, Northern District of
Georgia.*

By

C. A. McGrew, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

JEFFIE D. SULLIVAN

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way, we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwaitkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December, 1919. After his release from that prison he was retaken on the warden's warrant and, in January, 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. *Escove vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated; and if so, the old sentences should be served in full as the

parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay; but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

JEFFIE D. SULLIVAN

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 25 to 37 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8555, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Jeffie D. Sullivan is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 24 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,
*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

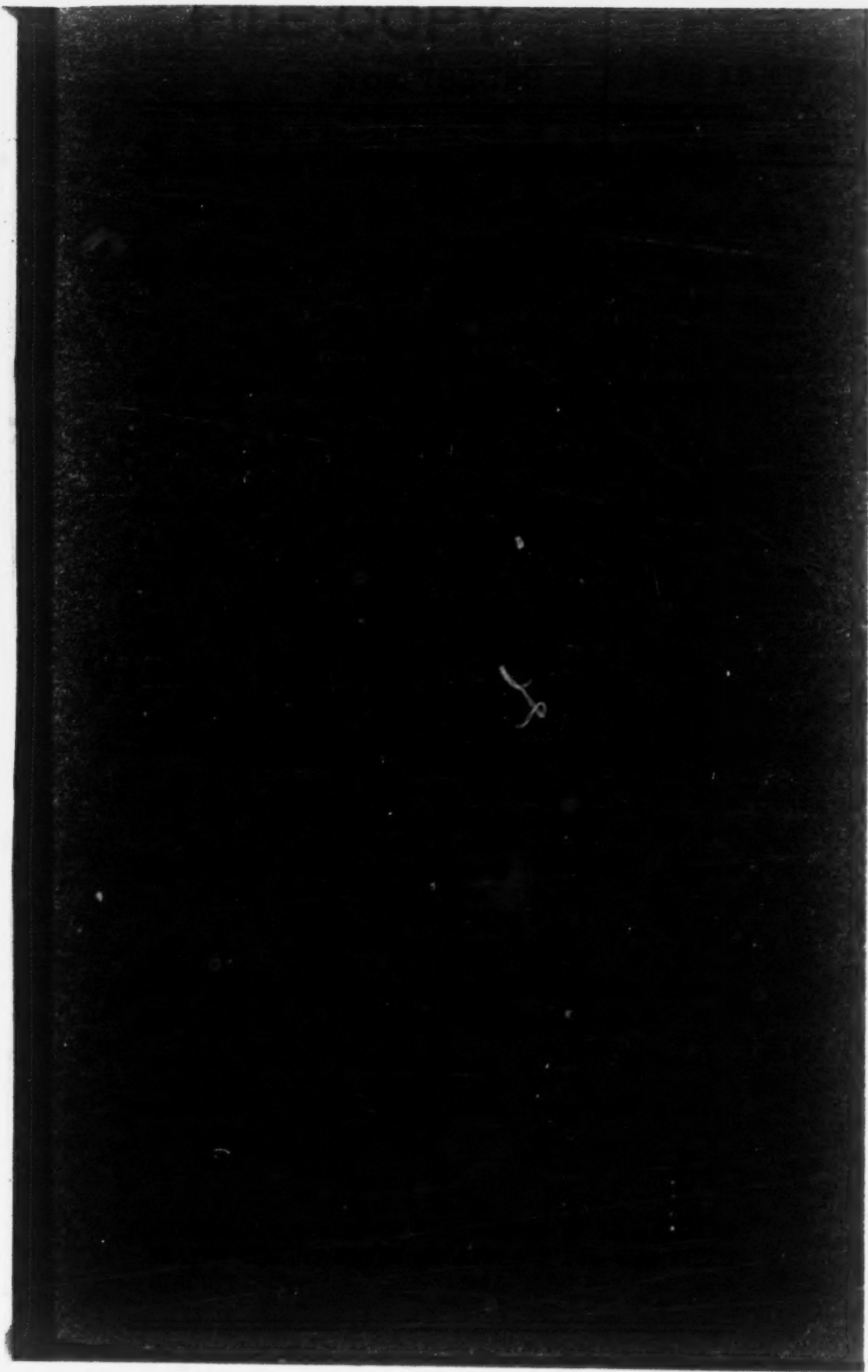
Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

SHERMAN KIDWELL

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

DEWEY SMITH

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

ALLEN COLLINS

No. 785

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

WALTER OWENS

(1)

No. 786

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

FRANK PEEL

No. 787

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

BENNIE JONES

No. 788

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

HENRY STONE

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

JEFFIE D. SULLIVAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

The Acting Solicitor General, on behalf of the petitioner, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cases entered on November 10, 1937, affirming orders of the District Court for the Northern District of Georgia sustaining writs of habeas corpus and discharging the respondents from custody.

OPINIONS BELOW

The opinion of the District Court in *Kidwell v. Zerbst* (R. 20-26) is reported in 19 F. Supp. 475. The order of the District Court in the other cases sustaining the writs of habeas corpus adopted the opinion in the *Kidwell* case. (See for example, *Smith* case, R. 15-16.) One opinion was rendered by the Circuit Court of Appeals covering all of the cases. It is reported in 92 F. (2d) 756.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 10, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a prisoner sentenced to a Federal penal institution for an offense committed while he was on parole from such an institution may be required by the Parole Board to serve the unexpired por-

tion of his first sentence after the expiration of his second sentence.

STATUTES INVOLVED

The pertinent statutory provisions are contained in the Appendix, *infra*, pp. 16-20.

STATEMENT

All of the above eight cases were argued and submitted together in the Circuit Court of Appeals and were decided by that court in one opinion. Such differences of fact as exist in the cases are, we believe, of no controlling importance. The material facts common to all of the cases were summarized by the Circuit Court of Appeals in its opinion as follows:

Appellees [respondents], while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct.¹ Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second

¹ Prisoners released with credit for good conduct are treated as on parole until the expiration of their maximum term. (See U. S. C., Title 18, Sec. 716 (b), Appendix, *infra*, p. 19.) Such prisoners, as the Circuit Court of Appeals conceded, are consequently as much within the jurisdiction of the Parole Board as those who are granted paroles.

sentence, a member of the Parole Board issued a warrant,² directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated.³ However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner

² While it is of no material difference, as no attempt was made to take the prisoners into custody under the warrants, it should be stated that in all of the cases, except the *Collins* and *Peel* cases, the warrants were apparently issued prior to incarceration on the second sentences.

³ While the warrant in the *Kidwell* case recited that (R. 20). "satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, *the same is hereby revoked* and the said paroled prisoner is declared to be a fugitive from justice" [*Italics ours*], the provision as to revocation is of no consequence. As is evident from U. S. C., Title 18, Secs. 719, 723a, 723b and 723c (Appendix, *infra*, pp. 18-19), parole may be revoked by the full Board of three members only after the prisoner has been returned to prison under the warrant and after an opportunity for a hearing has been afforded him. The form of warrant used in the *Kidwell* case is an old form. That now utilized by the Parole Board omits any reference to a revocation of parole (See *Owens* case, R. 17).

named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence,⁴ without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

The court then proceeded to give the facts in the *Sullivan* case as typical.

Pending appeal by the Government to the Circuit Court of Appeals for the Fifth Circuit, each of the respondents was released on bail. (See, for example, *Kidwell* case, R. 28.)

The Circuit Court of Appeals, one judge dissenting, affirmed the orders of the District Court sustaining the release of respondents on habeas corpus.

The majority reached the conclusion that in each case the first and second sentences ran concurrently

⁴ Thus, in the *Sullivan* case the time remaining on the first sentence at the time of imprisonment on the second sentence was 132 days (R. 7), while in the *Kidwell* case it was 395 days (R. 16) and in the *Collins* case 638 days (R. 9). It should also be noted that the release on habeas corpus in each case was after expiration of the time fixed in the second sentence.

from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the first sentence be served consecutively. The majority decision was based primarily upon the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any direction to the contrary, and upon the provision of U. S. C., Title 18, Sec. 723c (Appendix, *infra*, p. 19), that "The unexpired term of imprisonment of any such prisoner [i. e., one for whom the Parole Board or any Member thereof has issued a warrant for his retaking] shall begin to run from the date he is returned to the institution." It held of no consequence the fact that the prisoner was returned to prison under the commitment on the new sentence and not upon the warrant of the Parole Board, the execution of which the Board had delayed until after the expiration of the new sentence, saying that: "The province of the warrants was to secure the return of the prisoners. Since they were already in custody, the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences," citing *Hill v. Wampler*, 298 U. S. 460, 465.

The majority also held of no consequence the facts that the Parole Board had not held a hearing as to parole violation after the prisoners had been returned to prison on the new sentences and

that it had not revoked parole. It declared in effect that although the prisoner had not been returned to prison under the warrant but by virtue of the commitment on the new sentence, the Board was required under U. S. C., Title 18, Sec. 719 (Appendix, *infra*, p. 18), to grant the prisoner a hearing on parole violation at its first meeting after the prisoner was returned to custody and that while "thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so."

The dissenting judge aptly pointed out:

*If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. * * ** The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole; thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences. [Italics ours.]

After analysis of U. S. C., Title 18, Sec. 719 (Appendix, *infra*, p. 18), the dissenting judge stated that there was given to the Parole Board "express discretionary authority * * * to postpone the revocation of the parole;" and that

If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that where a prisoner has been returned to a Federal penal institution on a sentence for a new offense committed while on parole from such an institution, the unexpired portion of the original sentence is to be served concurrently with the new sentence, even though the prisoner was not returned to custody under the warrant of the

Parole Board and the Board has not held a hearing and revoked parole.

2. In not holding that where the Parole Board had issued its warrant for the retaking of a paroled prisoner during the period of his original sentence, it could postpone service of the warrant until after the expiration of the new sentence and thereafter hold a hearing on the charge of parole violation, revoke parole, and order service of the unexpired portion of the original sentence.

3. In affirming the judgments of the District Court sustaining the writs of habeas corpus and discharging the respondents from custody.

REASONS FOR GRANTING THE WRIT

1. In holding that a parolee who commits an offense for which he is reimprisoned in a Federal institution serves the unexpired portion of his original sentence coterminously with the new sentence, the majority decision below makes impossible the punishment contemplated by the Parole Law for violation of parole. The Parole Law clearly directs as a punishment for a parole violation that the parole violator be returned to prison and that, if his parole is revoked, he be required to serve the time for which he was originally sentenced without diminution for the period he was on parole (U. S. C., Title 18, Secs. 719, 723c; Appendix, *infra*, pp. 18, 19). Such punishment for violation of parole can be fully accomplished through prompt action by the Parole Board where the violation does not

constitute an offense for which the parolee is reincarcerated. Where, however, a new offense intervenes for which the parolee is reimprisoned, he obviously does not suffer the punishment contemplated by the statute in the event of a revocation of parole where he is permitted to serve any portion of the unexpired balance of his original sentence concurrently with that prescribed by his new sentence.⁵ Indeed, if the new sentence is longer than or equal to the remainder of the old sentence, there would be no punishment at all suffered for the parole violation under the majority decision. It is only by postponing the service of its warrant for the retaking of the prisoner and the revocation of parole until after the expiration of the new sentence, as in the instant cases, that the Board may make effective the punishment which the statute contemplates.

The power of the Board to follow such procedure under the statute cannot be questioned where the new offense results in incarceration in a State institution. It is well established in such cases that if the parole warrant is issued during the period of the original sentence the Parole Board may delay a retaking of custody on it and a revocation of parole until the parolee serves his term in the State

⁵ It was for this reason that the Board no longer follows the practice which it pursued in *White v. Kwiatkowski*, 60 F. (2d) 264 (C. C. A. 10th). There the Board during incarceration of the parolee on a new sentence to a Federal institution revoked parole on the former sentence. It was held that in view of the revocation of parole both sentences were served concurrently.

institution, *Anderson v. Corall*, 263 U. S. 193; *Platek v. Aderhold*, 73 F. (2d) 173 (C. C. A. 5th) (second sentences for State offenses); *Stockton v. Massey*, 34 F. (2d) 96 (C. C. A. 4th), certiorari denied, 281 U. S. 723, (second sentence for Federal offense but to a local jail). See also, *Biddle v. Asher*, 295 Fed. 670 (C. C. A. 8th). In such a case obviously the parolee cannot be made to suffer the punishment contemplated by the statute until after his imprisonment in the State institution has terminated.

There is nothing in the Parole Law, we submit, which requires any different treatment of the situation where the parolee is returned to a Federal institution for the new offense. While the parole warrant is required to be issued during the term of the parolee's sentence, the statute does not specifically direct when it shall be served. (U. S. C., Title 18, Sec. 717; Appendix, *infra*, p. 17.) The statute merely says that "At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the board of parole, and the board may then, or any time in its discretion, revoke the order [of parole] and terminate such parole or modify the terms and conditions thereof." (U. S. C., Title 18, Sec. 719; Appendix, *infra*, p. 18.) It is obvious that the procedural step which re-

quires the Board to hold a hearing and to determine whether it will revoke parole is a returning of the parolee to prison pursuant to the warrant of the Board. Not until then is the Board required to give any concern to the matter of revocation of parole. Unless the statute is so construed that the Parole Board may postpone the service of its warrant and the revocation of parole until after the parolee has served his second sentence in the Federal institution, there is no way in which the punishment contemplated by the statute may be meted out to the parole violator. As the dissenting judge aptly pointed out:

The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, [Appendix, *infra*, p. 19] in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had

been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

Much is made in the majority opinion of the language of the Parole Act that "The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution." (U. S. C., Title 18, Sec. 723c; Appendix, *infra*, p. 19.) Comparison of this language, however, with the other provisions of the statute shows clearly that the language refers to a return of the parolee to the institution by virtue of the parole warrant—the step in the procedure outlined in the Parole Law which requires the Parole Board to hold a hearing and to determine whether parole should be revoked. In the instant cases the parolees were returned to prison not by reason of any action of the Parole Board, but solely by virtue of the commitments on the new sentences.

Hill v. Wampler, 298 U. S. 460, cited in the majority decision, is clearly not in point. This case merely held that sentence is served on the authority of the judgment and the sentence and not the com-

mitment, if there is a variance between them. Re-imprisonment of a parole violator was not involved.

For a like reason the cases cited by the majority below which establish that where a person is confined in an institution under two separate sentences, they run concurrently, in the absence of any provision to the contrary, are without application.

2. The question presented is obviously one which is of vital importance in the administration of the Federal Parole Law. It should be settled by a decision of this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

FEBRUARY 1938.

APPENDIX

Pertinent Statutes

U. S. C., Title 18:

§ 714. Parole of prisoners; conditions. Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (June 25, 1910, c. 387, § 1, 36 Stat. 819; Jan. 23, 1913, c. 9, 37 Stat. 650.)

* * * * *

§ 716. Same; application for parole. If it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to

go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe; and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. No release on parole shall become operative until the findings of the board of parole under the terms hereof shall have been approved by the Attorney General of the United States. (June 25, 1910, c. 387, § 3, 36 Stat. 819.)

§ 716a. Same; continuance of parole until expiration of maximum sentence without deductions. Any prisoner sentenced after June 29, 1932, who may be paroled under authority of the parole laws, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law. (June 29, 1932, c. 310, § 3, 47 Stat. 381.)

§ 717. Same; violation of parole; warrant for retaking prisoner. If the warden of the prison or penitentiary from which said prisoner was paroled or the board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer herein-

after authorized to execute the same for the retaking of such prisoner. (June 25, 1910, c. 387, § 4, 36 Stat. 820.)

* * * * *

§ 719. Same; action by board on issue of warrant; revocation of parole. At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the board of parole, and the board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed, and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (June 25, 1910, c. 387, § 6, 36 Stat. 820.)

* * * * *

§ 723a. Same; creation of single Board of Parole; membership; appointment; salary.

In lieu of all boards of parole at Federal penal and correctional institutions existing on June 12, 1930, there is created as of that date a single Board of Parole to consist of three members to be appointed by the Attorney General, at a salary of \$7,500 each per annum. (May 13, 1930, c. 255, § 1, 46 Stat. 272.)

§ 723b. Same; power, authority, and duties of Board of Parole; prisoners in State reformatories. All power and authority on June 12, 1930, vested in, and all duties on that date imposed upon, the Attorney General and the several boards of parole existing on

that date with respect to the parole of United States prisoners are as of that date transferred to the Board of Parole created by section 723a of this title: *Provided, however,* That this section and sections 723a and 723c of this title shall not affect the method, terms, or conditions under which United States prisoners confined in any State reformatory are paroled, except that the power to approve the release on parole of such prisoners is conferred upon the Board of Parole created by section 723a of this title. (May 13, 1930, c. 255, § 2, 46 Stat. 272.)

§ 723c. Same; violation of parole; warrant for retaking prisoner; effect of violation on unexpired term of imprisonment. The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve. (May 13, 1930, c. 255, § 3, 46 Stat. 272.)

* * * * *

§ 716b. Same; prisoners released with credit for good conduct treated as on parole until expiration of maximum term. Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or

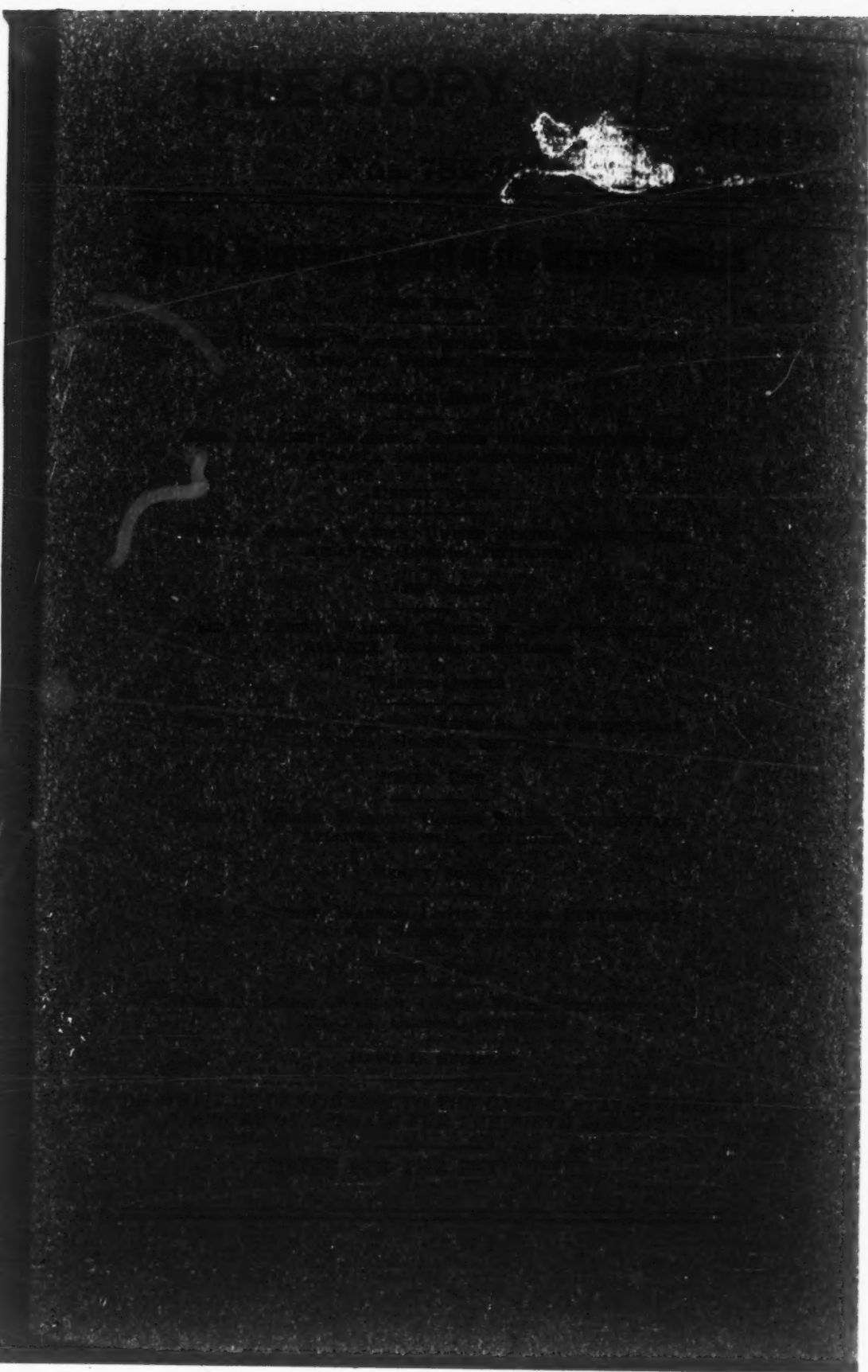
terms specified in his sentence: *Provided*, That this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody. (June 29, 1932, c. 310, § 4, 47 Stat. 381.)

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

SHERMAN KIDWELL

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

DEWEY SMITH

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

ALLEN COLLINS

No. 785

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

WALTER OWENS

(1)

No. 786

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

FRANK PEEL

No. 787

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

BENNY JONES

No. 788

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

HENRY STONE

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER

v.

JEFFIE D. SULLIVAN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court in *Kidwell v. Zerbst* (R. 20-26) is reported in 19 F. Supp. 475. The orders of the District Court in the other cases sustaining the writs of habeas corpus adopted the opinion in the *Kidwell* case. (See, for example, *Smith* case, R. 15-16.) One opinion was rendered by the Circuit Court of Appeals covering all of the cases. It is reported in 92 F. (2d) 756.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 10, 1937. The petition for writs of certiorari was filed in this Court on February 10, 1938. It was granted March 28, 1938. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a prisoner sentenced to a Federal penal institution for an offense committed while he was on parole from such an institution may be required by the Parole Board to serve the unexpired portion of his first sentence after the expiration of his second sentence.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*, pp. 20-24.

STATEMENT

All of the above eight cases were argued and submitted together in the Circuit Court of Appeals and were decided by that court in one opinion. Although we believe that such differences of fact as exist in the cases are not of controlling importance, we have set forth in Appendix B, *infra*, pp. 25-32, a summary of the pertinent facts in each case. The material facts common to all of the cases were summarized by the Circuit Court of Appeals in its opinion as follows (see *Kidwell* case, R. 35-36):

Appellees [respondents], while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct.¹ Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant,² directed to

¹ Prisoners released with credit for good conduct are treated as on parole until the expiration of their maximum term. (See U. S. C., Title 18, Sec. 716 (b); Appendix A, *infra*, p. 24). Such prisoners, as the Circuit Court of Appeals stated, are consequently as much within the jurisdiction of the Parole Board as those who are granted paroles.

² While it is of no material difference, as no attempt was made to take the prisoners into custody under the warrants, it should be stated that in all of the cases, except the *Collins* and *Peel* cases, the warrants were apparently issued prior to incarceration on the second sentence.

any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated.³ However, the warrant did not designate the institution.

The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the war-

³ While the warrant in the *Kidwell* case recited that (R. 20) "satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, *the same is hereby revoked* and the said paroled prisoner is declared to be a fugitive from justice" [italics ours], the provision as to revocation is of no consequence. As is evident from U. S. C., Title 18, Secs. 719, 723a, 723b, and 723c (Appendix A, *infra*, pp. 22-24), parole may be revoked only by the Board and then only after the prisoner has been returned to prison under the warrant and after an opportunity for a hearing has been afforded him. The form of warrant used in the *Kidwell* case is an old form. That now utilized by the Parole Board omits any reference to a revocation of parole. (See *Owens* case, R. 17.)

rant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence,⁴ without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

Pending appeal by the Warden to the Circuit Court of Appeals for the Fifth Circuit, each of the respondents was released on bail. (See, for example, *Kidwell* case, R. 28.)

The Circuit Court of Appeals, one judge dissenting, affirmed the orders of the District Court sustaining the release of respondents on habeas corpus.

The majority reached the conclusion that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the first sentence be served consecutively. The majority decision was based primarily upon the general rule that where a person is confined in an

⁴ Thus, in the *Jones* case (R. 9, 11) and in the *Sullivan* case (R. 7) the time remaining on the first sentence at the time of imprisonment on the second sentence was 132 days, while in the *Kidwell* case it was 395 days (R. 16) and in the *Collins* case 638 days (R. 9). It should also be noted that the release on habeas corpus in each case was after expiration of the time fixed in the second sentence.

institution under two separate sentences they run concurrently, in the absence of any direction to the contrary, and upon the provision of U. S. C., Title 18, Sec. 723c (Appendix A, *infra*, pp. 23-24), that "The unexpired term of imprisonment of any such prisoner [i. e., one for whom the Parole Board or any Member thereof has issued a warrant for his retaking] shall begin to run from the date he is returned to the institution." It held of no consequence the fact that the prisoner was returned to prison under the commitment on the new sentence and not upon the warrant of the Parole Board, the execution of which the Board had delayed until after the expiration of the new sentence, saying that: "The province of the warrants was to secure the return of the prisoners. Since they were already in custody, the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences" (citing *Hill v. Wampler*, 298 U. S. 460, 465).

The majority also held of no consequence the facts that the Parole Board had not held a hearing as to parole violation after the prisoners had been returned to prison on the new sentences and that it had not revoked parole. It declared in effect that although the prisoner had not been returned to prison under the warrant but by virtue of the commitment on the new sentence, the Board was required under U. S. C., Title 18, Sec. 719 (Appendix, *infra*, p. 22), to grant the prisoner a hearing on parole violation at its first meeting after the pris-

oner was returned to custody and that while "thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so."

The dissenting judge was of the opinion that the policy of the parole statute would not be carried out if the sentences ran concurrently, and that the conclusion reached by the majority would make impractical any real punishment for parole violations where such violations consist of Federal offenses. He was consequently of the opinion that "If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall," the Parole Board had the discretionary authority to accomplish this by postponing service of the parole warrant and revocation proceedings until the new sentence had been served.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that where a prisoner has been returned to a Federal penal institution on a sentence for a new offense committed while on parole from such an institution, the unexpired portion of the original sentence is to be served concurrently with the new sentence, even though the prisoner was not returned to custody under the warrant of

the Parole Board and the Board has not held a hearing and revoked parole.

2. In not holding that where the Parole Board had issued its warrant for the retaking of a paroled prisoner during the period of his original sentence, it could postpone service of the warrant until after the expiration of the new sentence and thereafter hold a hearing on the charge of parole violation, revoke parole, and order service of the unexpired portion of the original sentence.

3. In affirming the judgments of the District Court sustaining the writs of habeas corpus and discharging the respondents from custody.

SUMMARY OF ARGUMENT

The majority decision below, in holding that the respondents have served both their second sentences and the unexpired portions of their first sentences, failed to recognize that under the parole law a parole violator does not begin to serve the remainder of his original sentence until he has been returned to prison by virtue of the warrant of the Parole Board. It is the reimprisonment of the parole violator pursuant to the Board's warrant that sets in motion the procedure which requires the Board to determine whether it will revoke parole.

The result of the majority decision is that parole violators who commit Federal offenses while on parole, for which they are reincarcerated in Federal institutions, will escape the punishment contemplated by the statute for parole violations. The

majority decision also deprives the Parole Board of the authority and jurisdiction vested in it by the parole law where the parole violations are Federal offenses. It is only by construing the parole law so as to permit the Parole Board to postpone the service of its warrant for the retaking of the parolee and the revocation of parole until after the expiration of the new sentence, as in the instant cases, that the power of the Parole Board may be upheld and the punishment contemplated by the statute made effective.

ARGUMENT

UNDER A PROPER CONSTRUCTION OF THE PAROLE LAW
RESPONDENTS DID NOT SERVE THE UNEXPIRED PORTIONS
OF THEIR ORIGINAL SENTENCES CONCURRENTLY
WITH THEIR NEW SENTENCES

In holding that a parolee who commits an offense for which he is reimprisoned in a Federal institution serves the unexpired portion of his original sentence coterminously with the new sentence, the majority decision below makes impossible the punishment contemplated by the parole law for violation of parole. That statute clearly contemplates as punishment for a parole violation that the parolee shall be returned to prison and required to serve the time for which he was originally sentenced without diminution for the period he was on parole (U. S. C., Title 18, Secs. 719, 723c; Appendix A, *infra*, pp. 22, 23, 24).

Where the parole violation consists merely of a comparatively minor breach of a parole condition,

which does not constitute a crime, such as the failure to report to the parole adviser, going outside the parole limits without written permission, association with persons of bad reputation, etc., the punishment contemplated by the parole law for violation of parole can be fully accomplished through prompt action by the Parole Board.

Where, however, a new offense intervenes for which the parolee is reimprisoned, he obviously does not suffer the punishment contemplated by the statute in the event of a revocation of parole where he is permitted to serve any portion of the unexpired balance of his original sentence concurrently with ~~that prescribed by~~ his new sentence. Indeed, under the majority decision of the court below, if the new sentence is equal to or longer than the remainder of the old sentence, there would be no punishment at all suffered for the parole violation. It is only by postponing the service of its warrant for the retaking of the prisoner and the revocation of parole until after the expiration of the new sentence, as in the instant cases, that the Board may make effective the punishment which the statute contemplates.⁵

⁵ It was for this reason that the Board no longer follows the practice which it pursued in *White v. Kwiatkowski*, 60 F. (2d) 264 (C. C. A. 10th). There the Board, during incarceration of the parolee in a Federal institution on a new sentence, revoked parole on the former sentence. It was held in view of the revocation of parole that both sentences were served concurrently.

The power of the Board to follow such procedure under the parole law cannot be questioned where the new offense results in incarceration in a state institution, and this is true although the new offense is a Federal one. It is well established in such cases that, if the parole warrant is issued during the period of the original sentence, the Parole Board may delay a retaking into custody on it and a revocation of parole until the parolee serves his term for the second offense. *Anderson v. Corall*, 263 U. S. 193; *Platek v. Aderhold*, 73 F. (2d) 173 (C. C. A. 5th) (second sentences for State offenses); *Stockton v. Massey*, 34 F. (2d) 96 (C. C. A. 4th), certiorari denied, 281 U. S. 723 (second sentence for Federal offense but to a local jail). See also *Biddle v. Asher*, 295 Fed. 670 (C. C. A. 8th). Unless the parole law is so construed as to permit the Parole Board to follow the same procedure where the violation of parole consists of a second offense for which the parolee is reimprisoned in a Federal institution, the punishment contemplated by the parole law cannot be meted out to such a parole violator. That the Parole Board is the only agency which can make effective such punishment is aptly pointed out by the dissenting judge in the following language (*Kidwell* case, R. 39-40):

The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13,

1930, in the Board of Parole and its members. If he should direct the new sentences to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The necessary result of the decision of the majority below is that the only class of parole violators who do not suffer the punishment contemplated by the statute are those who commit Federal offenses while on parole for which they are reincarcerated in Federal institutions. This, we submit, results in an anomalous situation which is contrary to the manifest intent of the parole law.

Another result of the majority decision below is that in circumstances such as these it divests the Parole Board of the authority and jurisdiction vested in it by the parole law. The majority held in effect that such a violator is serving the unexpired portion of his original sentence even though the Parole Board has not revoked parole nor taken any effective steps looking toward such revocation. The parole law as a whole clearly discloses that the Parole Board has been vested with exclusive jurisdiction over matters of parole. It has sole authority to release prisoners on parole, impose such parole conditions as it may deem proper, issue warrants for the retaking of prisoners who have violated their parole, and to determine whether parole should be revoked or the terms and conditions thereof modified. (U. S. C., Title 18, Secs. 716, 719, 723b, 723c; Appendix A, *infra*, pp. 20, 22, 23.)

The fundamental error, we submit, in the decision of the majority of the court below is their failure to attach any significance to the fact that the respondents were returned to prison through the commitments on the new sentences and not pursuant to the warrants of the Parole Board. The majority said in effect that the only province of the warrants was to secure the return of the prisoners, and that since they were already in custody the issuance of warrants was vain and useless. This, however, ignores an essential significance of the warrant under the parole law. Under U. S. C., Title 18, Secs. 717, 723c (Appendix A, *infra*, pp.

22-23), any member of the Parole Board who has received reliable information that a prisoner has violated his parole may issue a warrant for his retaking. While the statute requires that this warrant be issued during the term of the parolee's sentence (Sec. 717), it does not specifically direct when it shall be executed. The statute merely says that "At the next meeting of the Board of Parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the Board of Parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the Board of Parole, and the Board may then, or at any time at its discretion, revoke the order [of parole] and terminate such parole or modify the terms and conditions thereof." (U. S. C., Title 18, Sec. 719; Appendix A, *infra*, p. 22.)

It is evident therefore that the parole warrant has another purpose than that of merely securing the return of the parolee to prison. Not until the execution of the warrant, i. e., the return of the parolee to prison *pursuant to the warrant*, is the Board required to hold a hearing and consider the matter of revocation of parole. Consequently, the execution of the warrant is the essential step which brings into operation the procedure for revocation which is outlined in the statute. In the instant cases the respondents cannot be considered as having served the unexpired portions of their old sen-

tences coterminously with their new sentences, inasmuch as the parole warrants had not been executed by the reimprisonment of the parolees pursuant to the warrants and parole had not been revoked by the Board.

Although the respondents in the instant cases were not reimprisoned pursuant to the parole warrants and although, in consequence, the Board was not required to determine whether their paroles should be revoked, the majority below has so misinterpreted another provision of the parole law (U. S. C., Title 18, Sec. 723c; Appendix A, *infra*, pp. 23-24) as to conclude that when the respondents were committed under their new sentences, they immediately began to serve the unexpired portions of their original sentences. The language upon which the majority below relies is that "The unexpired term of imprisonment of any such prisoner [i. e., one for whom the Parole Board or any member thereof has issued a warrant for his retaking] shall begin to run from the date he is returned to the institution." Comparison of this language, however, with other provisions of the statute (U. S. C., Title 18, Secs. 717, 719; Appendix A, *infra*, p. 22) clearly shows that this language refers only to a reimprisonment of the parole violator by virtue of the warrant of the Parole Board—the essential step in the procedure outlined in the parole law which requires the Parole Board to hold a hearing and determine whether parole should be revoked. Section 723c itself provides that the Board of

Parole, or any member, shall "have the exclusive authority to issue warrants for the retaking" of parole violators; Section 717 authorizes their issuance upon reliable information of parole violations; and Section 719 provides for a hearing after issuance of the warrant, retaking of the prisoner, and his return to prison. It is clear, therefore, that the language of Section 723c has no application to the respondents, who were returned to prison not by reason of any action by the Parole Board but solely by virtue of the commitments on the new sentences.

It was by reason of their misconception of the meaning of Section 723c that the majority below reached the conclusion that a parolee who is reimprisoned on a new sentence for an offense committed while on parole is required, under Section 719, to be given a hearing by the Board of Parole at its next meeting after the parolee has thus been returned to prison. However, as we have heretofore pointed out, the return to prison which fixes the time for the holding of that hearing is a return which has been accomplished pursuant to the warrant of the Parole Board and not a return which has occurred through a commitment under a new sentence. We do not contend that the Parole Board can arbitrarily withhold the granting of a hearing to a parolee beyond its first meeting after the parolee has been returned to prison pursuant to the Board's warrant. It is true that, under our construction of the statute, the parolee

whose violation consists of a new offense for which he is reimprisoned does not receive as prompt a hearing as does the parolee whose violation is not of that character. This, however, does not result in any prejudice to the former. His hearing obviously would be but formal in character since his commission of a second offense while on parole *ipso facto* constituted a breach of parole, a breach which, of course, he cannot dispute in the face of the record of his conviction. Even if it were possible for such a parolee to present extenuating circumstances to the Board, these circumstances would lose none of their value simply because the hearing is not held until the second sentence has been served.

In reaching its conclusion the majority below relied, in part, upon the rule that, where one is confined in an institution under two separate sentences, they run concurrently, in the absence of any provision to the contrary. The application of this rule by the majority was based, it is evident, upon their assumption that the respondents began to serve the unexpired portions of their original sentences immediately upon their return to prison, even though they were returned by virtue of the commitments on the new sentences and not pursuant to the warrants of the Parole Board. As we have heretofore shown, that assumption is erroneous, and hence there is no basis for the application of the rule in the instant case.

Hill v. Wampler, 298 U. S. 460, cited in the majority decision, is clearly not in point. This case merely held that sentences must be served on the authority of the judgment and the sentence and not the commitment, if there is a variance between them. Reimprisonment of a parole violator was not involved.

CONCLUSION

For the reasons stated, we respectfully submit that the judgments of the Circuit Court of Appeals should be reversed.

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Solicitor General.
 ✓ BRIEN McMAHON,
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 ✓ W. MARVIN SMITH,
Attorneys.

JAMES V. BENNETT,
Director, Bureau of Prisons,
Of Counsel.

APRIL, 1938. ,

APPENDIX A

THE PERTINENT STATUTES

U. S. C., Title 18:

§ 714. Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (June 25, 1910, c. 387, § 1, 36 Stat. 819; Jan. 23, 1913, c. 9, 37 Stat. 650.)

* * * * *

§ 716. Same; granting of parole; application; findings; terms and conditions; approval of Attorney General; parole of alien prisoners. If it shall appear to the Board of Parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of

Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. No release on parole shall become operative until the findings of the Board of Parole under the terms hereof shall have been approved by the Attorney General of the United States: *Provided*, That where a Federal prisoner is an alien and subject to deportation the Board of Parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside of the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation. (June 25, 1910, c. 387, § 3, 36 Stat. 819; May 13, 1930, c. 255, § 1, 46 Stat. 272; Mar. 2, 1931, c. 371, 46 Stat. 1469.)

§ 716a. Same; continuance of parole until expiration of maximum sentence without deductions. Any prisoner sentenced after June 29, 1932, who may be paroled under authority of the parole laws, shall continue

on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law. (June 29, 1932, c. 310, § 3, 47 Stat. 381.)

* * * * *

§ 717. Same; violation of parole; warrant for retaking prisoner. If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner. (June 25, 1910, c. 387, § 4, 36 Stat. 820; May 13, 1930, c. 255, § 1, 46 Stat. 272.)

* * * * *

§ 719. Same; action by board on issue of warrant; revocation of parole. At the next meeting of the Board of Parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the Board of Parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the Board of Parole, and the board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed, and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (June 25,

1910, c. 387, § 6, 36 Stat. 820; May 13, 1930, c. 255, § 1, 46 Stat. 272.)

* * * * *

§ 723a. Same; creation of single Board of Parole; membership; appointment; salary. In lieu of all boards of parole at Federal penal and correctional institutions existing on June 12, 1930, there is created as of that date a single Board of Parole to consist of three members to be appointed by the Attorney General, at a salary of \$7,500 each per annum. (May 13, 1930, c. 255, § 1, 46 Stat. 272.)

§ 723b. Same; power, authority, and duties of Board of Parole; prisoners in State reformatories. All power and authority on June 12, 1930, vested in, and all duties on that date imposed upon, the Attorney General and the several boards of parole existing on that date with respect to the parole of United States prisoners are as of that date transferred to the Board of Parole created by section 723a of this title: *Provided, however,* That this section and sections 723a and 723c of this title shall not affect the method, terms, or conditions under which United States prisoners confined in any State reformatory are paroled, except that the power to approve the release on parole of such prisoners is conferred upon the Board of Parole created by section 723a of this title. (May 13, 1930, c. 255, § 2, 46 Stat. 272.)

§ 723c. Same; violation of parole; warrant for retaking prisoner; effect of violation on unexpired term of imprisonment. The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The

unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve. (May 13, 1930, c. 255, § 3, 46 Stat. 272.)

* * * * *

Conditional Release:

§ 716b. Same; prisoners released with credit for good conduct treated as on parole until expiration of maximum term: Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence: *Provided*, That this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody. (June 29, 1932, c. 310, § 4, 47 Stat. 381.)

APPENDIX B

PERTINENT FACTS IN EACH OF THE EIGHT CASES

Kidwell case, No. 782

Kidwell received a two year sentence in the District Court for the Eastern District of Kentucky on September 27, 1932 (R. 11), and was committed to the Federal Reformatory Camp at Petersburg, Virginia (R. 13), from which he was released on parole on August 27, 1933 (R. 16, 17). While out on parole, Kidwell, on or about May 17, 1934, committed another offense for which he was indicted in the same District Court (R. 5-6). He entered a plea of guilty (R. 6) and was sentenced to two years imprisonment on June 29, 1935, the sentence making no reference to his parole status on the former sentence (R. 7). Kidwell was first committed to the Reformatory at Chillicothe, Ohio, on the new sentence (R. 9) and was later transferred to the Atlanta Penitentiary (R. 16).

In the meantime, on June 18, 1934, while Kidwell was on parole from his original sentence he was declared a parole violator and a warrant was issued for him (R. 16). The warrant was sent to the warden at Atlanta and there placed as a detainer with instructions to the warden to take Kidwell into custody at the expiration of the new sentence, and to list him for a hearing on the charge of violating his parole only after he was in custody on the warrant (R. 19). On January 21, 1937, the new

sentence expired and on the next day the warrant was served on Kidwell at which time 395 days of the original sentence remained to be served (R. 16, 17).

On March 23, 1937, before any hearing was held on the violation charge, Kidwell applied for a writ of habeas corpus (R. 1-5) which was sustained (R. 20-26). Pending appeal, Kidwell was released on bail (R. 28).

Smith case, No. 783

Smith was originally sentenced on July 10, 1934, in the District Court for the Southern District of West Virginia, to two years imprisonment and was committed to the Atlanta Penitentiary (R. 7). On February 14, 1936, on the expiration of his minimum term, he was conditionally released (R. 12). While at large he committed another offense of which he was convicted in the Eastern District of Kentucky (R. 9). On May 27, 1936, he received a sentence of one year and one day and was committed to the Atlanta Penitentiary (R. 9-10). The second sentence contained no reference to his parole status on the former sentence (R. 9). On March 26, 1936, a parole warrant had been issued for the retaking of Smith as a conditional release violator under his first sentence (R. 7). This warrant was transmitted to the warden of the Atlanta Penitentiary with instructions to place it as a detainer and take Smith into custody on the warrant at the expiration of the second sentence (R. 13). On March 16, 1937, the second sentence expired and Smith was then taken into custody on the parole warrant to serve the remainder of his first sentence which amounted to 177 days (R. 12, 13).

Smith applied for a writ of habeas corpus (R. 1-5) which was sustained (R. 15). Pending appeal, he was released on bail (R. 17).

Collins case, No. 784

On November 17, 1932, Collins was convicted in the District Court for the Southern District of West Virginia and sentenced to three years imprisonment (R. 7). He was released on parole on February 16, 1934 (R. 7). While on parole he committed another offense and on September 18, 1935, he was again convicted in the same court, sentenced to serve one year and one day, and committed to Atlanta (R. 10). The second sentence was silent as to sequence of service (R. 7). A parole violator's warrant was issued October 3, 1935 (R. 11), and was sent to the warden at Atlanta accompanied by instructions to place the warrant as a detainer and take Collins into custody on the warrant at the expiration of his second sentence (R. 14). The new sentence expired on June 25, 1936 (R. 7). At that time Collins had 638 days to serve on his first sentence (R. 12). On September 21, 1936, his parole was revoked and he was ordered to serve the remainder of his original sentence (R. 12-13). Collins petitioned for a writ of habeas corpus (R. 1-5) which was sustained (R. 15-16). Pending appeal, he was released on bail (R. 18).

Owens case, No. 785

In the District Court for the Northern District of Alabama, on June 26, 1934, Owens was sentenced to serve a term of 15 months (R. 7-8). He was committed to the United States Penitentiary at

Atlanta on June 29, 1934 (R. 20). On April 27, 1935, Owens was released on parole (R. 12, 20). While on parole Owens committed another offense and on March 9, 1936, after pleading guilty in the same court, he was sentenced to imprisonment for a period of 15 months (R. 9-10). The second sentence made no reference to the parole status of Owens on the former sentence. Pursuant to the second sentence Owens was committed to Atlanta (R. 16).

On September 24, 1935, Owens was declared to be a parole violator and a warrant was issued for him (R. 17). The warrant was sent to the warden at Atlanta accompanied by a letter dated April 20, 1936, directing the Warden to place the warrant as a detainer and to take Owens into custody on the warrant at the expiration of his new sentence, and further stating that the case should be listed for a hearing on the violation charge only after Owens was in custody on the warrant (R. 19). On March 10, 1937, the second sentence expired (R. 12) and he was retained in custody as a parole violator to serve the remainder of his first sentence which amounted to 151 days if his parole was revoked (R. 12, 18). On April 14, 1937, Owens applied for a writ of habeas corpus (R. 1-5) which was sustained on May 13, 1937 (R. 21). Pending appeal, Owens was released on bail (R. 23).

Peel case, No. 786

Peel was sentenced by the District Court for the Eastern District of Kentucky to serve a sentence of two years (R. 7, 12). On April 18, 1935, he was released on parole from the Federal Reformatory

Camp at Petersburg, Virginia (R. 12). While on parole he committed another offense and on October 24, 1935, upon his plea of guilty in the same court, he was sentenced to two years imprisonment (R. 10), and was committed to the Atlanta Penitentiary (R. 11). On November 21, 1935, Peel was declared to be a parole violator and a warrant was issued for him (R. 12-13). The warrant was sent to the warden at Atlanta with instructions to place the warrant as a detainer and to take Peel into custody on it at the expiration of the second sentence (R. 7). The warden was further instructed that the case should be listed for a hearing on the violation charge only after Peel was in custody on the warrant (R. 7). On June 1, 1937, the second sentence expired and Peel was served with the parole warrant and held under it to await the action of the next meeting of the Board of Parole (R. 7-8). The record does not indicate the number of days of the original sentence which remained to be served. Peel filed a petition for writ of habeas corpus on June 1, 1937 (R. 2-5) which was sustained on June 5, 1937 (R. 14-15). Pending appeal, Peel was released on bail (R. 16-17).

Jones case, No. 787

In the District Court for the Northern District of Alabama, on May 25, 1934, Jones upon his plea of guilty was sentenced to 22 months imprisonment and was committed to the United States Industrial Reformatory at Chillicothe, Ohio (R. 10-11). On November 13, 1935, he was released conditionally (R. 9, 14). While at large Jones committed another offense and on April 9, 1936, upon his conviction

by a jury, he was sentenced by the same court to imprisonment for 18 months (R. 16) and pursuant to such sentence was committed to the penitentiary at Atlanta (R. 18). On March 17, 1936, Jones had been declared a parole violator and a warrant was issued for him (R. 14). The warrant was sent to the warden at Atlanta on May 28, 1936, with instructions to place it as a detainer and to take Jones into custody on the warrant after the expiration of his second sentence (R. 13). On June 22, 1937, Jones completed his second sentence, at which time the parole warrant was served on him and he was held in custody as a conditional release violator to complete service of the unexpired portion of his first term (R. 9, 15). 132 days remained to be served upon the first sentence (R. 9, 11). On June 18, 1937, Jones applied for a writ of habeas corpus (R. 1-5) which was sustained (R. 18-19). Pending appeal, he was released on bail (R. 21).

Stone case, No. 788

On June 3, 1935, upon his plea of guilty, Stone was sentenced by the District Court for the Middle District of Georgia to imprisonment for a year and a day and was committed to the Industrial Reformatory at Chillicothe, Ohio (R. 13-15). On December 3, 1935, he was released on parole (R. 11, 16). While on parole, on or about March 2, 1936, Stone committed another offense for which he was indicted in the same District Court (R. 7-9). He entered a plea of guilty (R. 9) and was sentenced to imprisonment for a year and a day (R. 10). He was committed to Atlanta on the new sentence (R. 17-18). On June 3, 1936, a parole violator's war-

rant was issued (R. 19) and the warrant was transmitted to the warden at Atlanta with directions to place it as a detainer and take Stone into custody at the expiration of the second sentence (R. 12). On May 12, 1937, the second sentence expired, the parole warrant was served on Stone and he was retained in custody to await action by the Board of Parole (R. 12, 16). At that time 183 days of the original sentence remained to be served (R. 16). On July 2, 1937, Stone applied for a writ of habeas corpus (R. 2-5) which was sustained (R. 21). Pending appeal Stone was released on bail.

Sullivan case, No. 789

On May 25, 1934, Sullivan was convicted in the Northern District of Alabama and sentenced to serve 22 months imprisonment (R. 5, 8). He was committed to the United States Reformatory at Chillicothe, Ohio (R. 5) and on November 13, 1935, he was released conditionally (R. 9, 12). While at large he committed another offense and on April 9, 1936, after conviction he was sentenced in the same court to imprisonment for 18 months and committed to the Atlanta Penitentiary (R. 12-14). On March 17, 1936, a parole violator's warrant was issued for him (R. 15-16). The warrant was transmitted to the warden at Atlanta on May 28, 1936, with instructions to place it as a detainer and to hold Sullivan as a conditional release violator after the expiration of the second sentence (R. 6). The second sentence expired June 22, 1937 (R. 16) at which time 132 days of the first sentence remained unserved (R. 6, 12). The parole warrant was served upon Sullivan, and he was held to await a

hearing before the Board of Parole (R. 7). A hearing was had on June 29, 1937, before one member of the Board who recommended that the conditional release be revoked (R. 7). On July 20, 1937, Sullivan applied for a writ of habeas corpus (R. 1-4) which was sustained (R. 17). Pending appeal Sullivan was released on bail (R. 19).

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1937

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CHARLES ELMORE CHOPLEY

CLERK

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA,
vs.

SHERMAN KIDWELL.

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, *Petitioner,*
vs.

DEWEY SMITH.

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, *Petitioner,*
vs.

ALLEN COLLINS.

No. 785

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, *Petitioner,*
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HENRY STONE.

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FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, *Petitioner,*
vs.

JEFFIE D. SULLIVAN.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

J. F. KEMP,
CLINT W. HAGER,
Counsel for Respondents.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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vs.

JEFFIE D. SULLIVAN.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

Statement of the Case.

The appellee was sentenced on July 10, 1934, in the United States District Court for the Southern District of West Virginia, to serve a term of two years in the penitentiary and was immediately thereafter sent to the United States Penitentiary in Atlanta, Georgia, for execution of said sentence. This sentence, with allowance for good conduct, expired on February 14, 1936, and appellee was conditionally released from the institution. At this time there remained one hundred seventeen days unexecuted of his maximum sentence which, under the terms of his conditional release, he was to be permitted to serve on parole. On March 26, 1936, he was declared to be a parole violator and a warrant was issued by Charles Whelan, a member of the United States Board of Parole, directing the rearrest of appellee, which warrant was in the following language:

"And, whereas, satisfactory evidence has been presented to the undersigned member of this Board that said prisoner named in this warrant has violated the condition of his release and is, therefore, deemed to be a fugitive from justice.

Now Therefore, this is to command you to execute this warrant by taking the said Dewey Smith, wherever found in the United States, and him safely return to the institution hereinafter designated.

Witness my hand and seal of this Board, this the 26th day of March, 1936.

CHARLES WHELAN,
Member, United States
Board of Parole."

When apprehended communicate with Director of Prisons for instructions.

On May 29, 1936, appellee was returned to the United States Penitentiary in Atlanta, Georgia, under a warrant of committment issued by the United States District Court for the Eastman District of Kentucky, directing imprisonment for one year and one day. The parole warrant issued by the Parole Board and dated March 26, 1936, was transmitted to the United States Penitentiary in Atlanta, Georgia, on June 29, 1936.

On June 29, 1936, Mr. Ray L. Hugg, Parole Executive, wrote the Warden of the United States Penitentiary the following letter:

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS,
WASHINGTON.

June 29, 1936.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

In re Dewey Smith, Old No. 44678-A,
New No. 48628-A. ZW.

DEAR SIR:

Enclosed herewith is copy of referral for consideration of alleged violation and violator warrant in duplicate for the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Smith into custody on the warrant at the expiration of his present sentence. The case should be listed for a hear-

ing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office, stating specifically that you are holding the prisoner as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF,
Parole Executive.

The record, therefore, shows that appellee had been held under two sentences in the same penitentiary from May 29, 1936, to March 17, 1937, in execution of the year and a day sentence and from June 29, 1936, in execution of the remainder of his first sentence, amounting to one hundred seventeen days. If these ran concurrently appellee was entitled to his discharge on *habeas corpus* when he brought his writ on the 3rd day of April, 1937. If they did not run concurrently he was not entitled to his discharge at the time of bringing his writ. The government does not contend that there were any directions in either sentence as to sequence of service (R-7 and 8).

The identical question presented above is presented in the cases of

Zerbst v. Kidwell,
Zerbst v. Allen Collins,
Zerbst v. Walter Owens,
Zerbst v. Frank Peel,
Zerbst v. Bennie Jones,
Zerbst v. Henry Stone,
Zerbst v. Jeffie D. Sullivan.

The only material distinction between these named cases and the *Dewey Smith* case is that Dewey Smith was sentenced from different District Courts. In all of the other cases the same court imposed both the first and the second sentences. The Government concedes that the questions

involved in all of the said cases are precisely the same and deals with all of said cases in one brief.

The attorney filing this brief was appointed by the District Court to represent the appellees in all of the above named cases and following the example of the Government attorneys will file but one brief.

Question Presented.

Whether in a case where a parole violator has been returned to the penitentiary on a second sentence for an offense committed while he was on parole and he is also held as a parole violator to serve the balance of his maximum sentence imposed on his first conviction and where both commitments are silent as to the sequence in which said sentences shall be served, do they run concurrently?

Argument and Citation of Authorities.

What authority did the Warden of the United States Penitentiary have to hold appellee as a prisoner either in his first or second case? It was not by virtue of any verdict, judgment or commitment of an Administrative Board called a Parole Board, but the sole authority of the Warden to detain appellee and deprive him of his liberty was derived solely from two commitments representing two judgments of the District Court of the United States. The above proposition is fundamental and will clarify the issues in this case.

Now let's look at these judgments and commitments and determine from them whether the sentences imposed on appellee shall run concurrently or consecutively. Admittedly both commitments are silent as to whether the sentences shall run consecutively or concurrently and gives no direction as to the sequence of service of the same. This being true the uniform rule is that the prisoner is permitted to serve his sentences concurrently. This principle is so

well established that it is not deemed necessary to cite any cases in reference thereto.

When appellee was returned to the penitentiary as a parole violator under a warrant issued by the Parole Board, he immediately resumed service of his original sentence under the original commitment in the hands of the warden. When a prisoner violates his parole and a warrant is issued for his arrest as a parole violator, he then and there becomes an escape and a fugitive.

Anderson v. Corall, 263 U. S. 193.

The running of his sentence is only tolled until he is retaken, otherwise the sentence is in effect.

Aderhold v. McCarthy, 65 F. (2d) 452.

Now let's apply these principles of law to the instant case. Appellee was sentenced to serve two years in the penitentiary on his first sentence. He served that sentence in the penitentiary until he was conditionally released on February 14, 1936. On March 26, 1936, a parole warrant was issued for retaking the prisoner as a conditional release violator. He then and there became a fugitive and an escape. When he was retaken the service of his sentence immediately began again and no device, trick or subterfuge of the Parole Board could prevent the service of his sentence being resumed when he was retaken.

In the case of

Aderhold v. McCarthy, *supra*, 65 F. (2d) 452,
the court said:

"McCarthy, therefore, in serving four years has served all his sentences unless his escape puts another face on the matter. That fact, of course, stopped the running of his first sentence until he was again taken into custody, but did not otherwise affect it. There was a recapture, no need to resentence him but only to put him in the penitentiary. * * * When Mc-

Carthy was incarcerated he was under lawful custody under either sentence and, therefore, under both."

The *McCarthy* case is squarely on all fours with the case at bar and this Court cannot reverse appellee's case without reversing the *McCarthy* case. In the *McCarthy* case the warden of the penitentiary attempted to do exactly what the Parole Board is attempting to do in this case. McCarthy was convicted in the District Court of Vermont on May 16, 1929, and given a sentence of a year and a day. Before reaching the penitentiary he escaped and in the following month, in New Hampshire, repeated his offense and on September 29, 1929, was sentenced to a term of four years in the penitentiary. He served his four year sentence and the warden then attempted to incarcerate him on the commitment which he held for a year and a day for the offense committed in Vermont. The original pleading in the *McCarthy* case will show that the warden did not have in his possession the commitment issued from the District Court of Vermont until the very day that McCarthy was to be discharged on his four year sentence. It makes no difference whether the accused became an escape through the violation of his parole by the escaping from the United States Marshall. When he is retaken his sentence then and there begins to be executed.

"Where accused is sentenced to the penitentiary by a different court without any provision for one sentence to follow the other, each sentence runs from the prisoner's date of entry into prison, and prisoner would be entitled to discharge upon expiration of longest term.

"Prisoner's escape after sentence to federal penitentiary stopped running of sentence until he was again taken into custody but did not otherwise affect sentence, resentence being unnecessary on his recapture."

The *McCarthy* case seems to be the settled law.

Zerbst v. Lyman (C. C. A. 5), 255 Fed. 609;

White v. Kwaitkowski (C. C. A. 10), 60 F. (2d) 265.

The fact that the first sentence was, at the time of parole, being served in a different institution, is as held by the Circuit Court of Appeals for the Tenth Circuit in *White v. Kwaitkowski*, 60 F. (2d) 264, wholly immaterial, for as the court said,

"To hold otherwise is to hold that the Attorney General may, by transfer to the reformatory, change concurrent to consecutive sentences but he has no such judicial power * * * the new Board (Parole Board) had no power to return the appellee to Chillicothe and did not attempt to do so. The remainder of the first sentence was served at Leavenworth and was satisfied."

If the trial court did not, in the case at bar, make the sentences run concurrently, how can the maneuvers and manipulations of a mere Administrative Board, called a Parole Board, change the sentences of a court? With the present system of identifying and finger printing prisoners the District Court in the Eastern District of Kentucky presumably knew of the previous conviction of appellee in the Southern District of West Virginia and if he had wanted the prisoner to serve consecutive sentences he could have made his sentence to commence and to take effect upon the expiration of the sentence imposed by the West Virginia Court.

Miketich v. United States, 72 F. (2d) 550.

In the Government's brief they envision some fanciful difficulties in permitting a court to pass a sentence for a second offense on a parole violator to take effect and to start at the expiration of the first sentence and say that the second sentence would begin and take effect on a contin-

gency. All consecutive sentences are based on contingencies, for instance, where several counts are in an indictment and concurrent sentences are imposed on each count, each sentence to begin at the expiration of the sentence on the previous count. There is always the contingency that some count may be reversed by the Court of Appeals or that the prisoner may be pardoned on some count but no practical difficulty results.

Miketich v. United States, supra, 72 F. (2d) 550.

Title 18, Section 716-B, provides in substance:

That when any prisoner is conditionally released from the penitentiary and good conduct allowance, "shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence."

Title 18, Section 723-C, U. S. C. A., provides in substance:

That the Board of Parole shall have authority to issue a warrant for the retaking of prisoners who violate their parole. "The unexpired term of imprisonment of any such prisoner shall begin to run from the date of his return to the institution. * * *"

How can the Parole Board violate this plain and unambiguous statute of Congress and attempt to hold a prisoner in the penitentiary for a period of years after he is returned as a parole violator and to maintain that by merely denying him the right of a hearing that the execution of his sentence is to be deferred? It makes no difference if the Parole Board, either through negligence, viciousness or misguided zeal, never gives the returned parole violator a hearing as required by law, Congress has provided in unmistakable terms that his sentence shall resume its running "from the date he is returned to the institution."

If the Parole Board holds a hearing under Section 719 of Title 18, U. S. C. A., they cannot resentence the prisoner, they cannot change the terms of his original commitment, they cannot change the effect of his original sentence, they can only modify or revoke their own order of termination of parole and if they never give the prisoner a hearing his sentence resumes its running upon his return to the institution and when the maximum time provided in his commitment has been served he is entitled to release whether the Parole Board have acted or not acted on his case. They cannot change the judgment of the court. They have no judicial function, they are a mere Administrative Board.

Section 709-A of the Title 18, U. S. C. A., was passed by Congress in 1932 and provided that sentence of a prisoner should begin to run when he is committed to a jail or other place of detention to await transportation to the penitentiary. This Section was passed because it was common knowledge that United States Marshals removed prisoners to the penitentiary at their own convenience and often left them in jail awaiting removal for periods of months and when finally removed and received at the penitentiary they got no credit for the time that they remained in jail resulting from the laziness, negligence or viciousness of an Administrative Officer. This statute was passed to correct such a situation.

Section 723-C of Title 18, U. S. C. A., was passed by Congress and provided that a prisoner returned to an institution as a parole violator should be entitled to have execution of his sentence resumed and to begin to run from the date of his return for the reason that Congress did not intend that a mere Parole Board should hold a prisoner through negligence or viciousness, awaiting a hearing on the revocation of his parole over an extended period of time and cause him to serve, thereby, time for which he would not get credit.

Let's assume in the case at bar that appellee had never been convicted of any second offense but that he had failed to make his monthly reports promptly and that the Parole Board had issued a warrant for his arrest and caused his return to the penitentiary as a parole violator and although he had but one hundred seventeen days to complete the full sentence imposed by the court, the Parole Board denied him a hearing for a period of five years at the end of which time they formally met, revoked his parole and forced him to serve one hundred seventeen days plus the five years he served awaiting a hearing. It was to avoid such absurdity that Congress provided in Section 723-C of Title 18, U. S. C. A., that when a parole violator is returned to the institution the service of his time shall begin immediately and not be dependent upon the whim or caprice of a Parole Board.

Respectfully submitted,

J. F. KEMP,
CLINT W. HAGER,
Attorneys for Respondents.

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SUPREME COURT OF THE UNITED STATES.

Nos. 782—789.—OCTOBER TERM, 1937.

Fred G. Zerbst, Warden, United
States Penitentiary, Atlanta,
Georgia, Petitioner,

782 *vs.*
 Sherman Kidwell.

783 Same,
 vs.
 Dewey Smith.

784 Same,
 vs.
 Allen Collins.

785 Same,
 vs.
 Walter Owens.

786 Same,
 vs.
 Frank Peel.

787 Same,
 vs.
 Bennie Jones.

788 Same,
 vs.
 Henry Stone.

789 Same,
 vs.
 Jeffie D. Sullivan.

On Writs of Certiorari to the
United States Circuit Court
of Appeals for the Fifth Cir-
cuit.

[May 16, 1938.]

Mr. Justice BLACK delivered the opinion of the Court.

Respondents were paroled before completing sentences in Federal prisons.¹ Before expiration of their sentences and while on parole, they committed second Federal offenses, for which they

¹ Some were released with credit for good conduct but are treated as on parole until their maximum terms have expired. 18 U. S. C., Ch. 22, Sec. 716(b).

were convicted, sentenced, and thereafter completely served sentences in the Atlanta Penitentiary. Respondents contend that from the moment of their imprisonment in the Penitentiary under the second sentences, they also began service of the unexpired part of their original sentences. If this contention is correct, respondents have also completely served the unexpired parts of the first sentences.

Petitioner contends, however, that when respondents violated their paroles by committing the second Federal crimes, they were no longer in custody under the first sentences; service of the first sentences was interrupted and suspended and was not resumed before completion of service of the second sentences; and that after completion of the second sentences, the Board of Parole has authority to require completion of the first sentences, service of which ceased due to the interruption by parole violations.

After completion of service of the second sentences, respondents were held in custody by the warden of the Penitentiary under warrants of a member of the Board of Parole alleging violations of parole. The District Court, believing the first sentences "began to run again the moment . . . [respondents were] received at the Penitentiary," discharged respondents from custody on habeas corpus proceedings.² The Court of Appeals affirmed.³ Due to the importance of the question involved, we granted certiorari.⁴

When respondent committed a Federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended. Thereafter, his imprisonment was attributable to his second sentence only, and his rights and status as to his first sentence were "analogous to those of an escaped convict."⁵ Not only had he—by his own conduct—forfeited the privileges granted him by parole, but since he was no longer in either actual or constructive custody under his first sentence, service under the second sentence can not be credited

² 19 Fed. Supp. 475. Respondents filed separate petitions for habeas corpus raising substantially identical issues, which will be treated together here, and the respondents will be dealt with as one.

³ 92 F. (2d) 756.

⁴ 302 U. S. —.

⁵ *Anderson v. Corall*, 263 U. S. 193, 196, 197.

to the first without doing violence to the plain intent and purpose of the statutes providing for a parole system.

The Parole Board and its members have been granted sole authority to issue a warrant for the arrest and return to custody of a prisoner who violates his parole.⁶ A member of the Board ordered that respondent be taken into custody *after* completion of the second sentence. Until completion of the second sentence—and before the warrant was served—respondent was imprisoned only by virtue of the second sentence. There is, therefore, no question as to concurrent service of sentences, unless—as respondent contends—Section 723(c)⁷ required that the unexpired part of respondent's first sentence begin when he was imprisoned under the second sentence. That Section provides:

“ . . . The Board of Parole . . . or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve.”

Obviously, this provision does not require that a parole violator's original, unexpired sentence shall begin to run from the date he is imprisoned for a new and separate offense. It can only refer to reimprisonment on the original sentence under order of the Parole Board.

Since service of the original sentence was interrupted by parole violation, the full term of *that* sentence has not been completed. Just as respondent's own misconduct (parole violation) has prevented completion of the original sentence, so has it continued the authority of the Board over respondent until that sentence is completed and expires. Discretionary authority in the Board to revoke a parole *at any time before expiration of a parolee's sentence* was provided—and is necessary—as a means of insuring the public that parole violators would be punished.⁸ The proper working of the parole system requires that the Board have authority to discipline,

⁶ 18 U. S. C., Ch. 22, Sec. 723(c).

⁷ *Id.*

⁸ The parole system was intended to make parole discretionary “and revocable at any time . . . [the parole authority] may elect to revoke it,” Cong. Rec., Vol. 45, p. 6374. “. . . the prisoner is under the absolute

guide and control parole violators whose sentences have not been completed. It is not reasonable to assume that Congress intended that a parolee whose conduct measures up to parole standards should remain under control of the Board until expiration of the term of his sentence, but that misconduct of a parole violator could result in reducing the time during which the Board has control over him to a period less than his original sentence.

Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the Board.⁹ Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offence committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified. If the parole laws should be construed as respondent contends, parole might be more reluctantly granted, contrary to the broad humane purpose of Congress to grant relief from imprisonment to deserving prisoners.¹⁰

Respondents have not completed service of their original sentences and were not entitled to release. The causes are reversed and remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of these cases.

control of that board, and he may be apprehended and returned at any time on violation of his parole. *Those are the safeguards for the benefit of society.*" *Id.*, p. 6377.

The governing Act expressly provides that: " . . . if said [retaken] prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the Board of Parole, and the Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. . . ." (Italics supplied.) 18 U. S. C., Ch. 22, Sec. 719.

⁹ See Cong. Record, Vol. 45, p. 6374; *United States v. Murray*, 275 U. S. 347, 357.

¹⁰ Cf., *United States v. Farrell*, 87 F. (2d) 957, 961.